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Supreme Court, U.S.
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No. _____

In the

Supreme Court of the United States

October Term, 1995

THE REVEREND THOMAS L. BASICH, et al.,

Petitioners,

v.

BOARD OF PENSIONS, EVANGELICAL LUTHERAN CHURCH IN AMERICA (ELCA), a Minnesota non-profit corporation; EVANGELICAL LUTHERAN CHURCH IN AMERICA (ELCA), a Minnesota non-profit corporation,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE MINNESOTA COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

LYNN E. BASICH
Counsel of Record
3000 North Hamline Ave.
Roseville, MN 55113
(612) 633-3232

Robert C. Bell
PETERSON, BELL, CONVERSE & JENSEN, P.A.
3000 Metropolitan Centre
333 South Seventh Street
Minneapolis, MN 55402
(612) 342-2323

Craig W. Gagnon
Peter R. Bisio
OPPENHEIMER WOLFF & DONNELLY
3400 Plaza VII Building
45 South Seventh Street
Minneapolis, MN 55402
(612) 334-9300

Attorneys for Petitioners

1996 – Bachman Legal Printing ■ (612) 339-9518 ■ FAX (612) 337-8053

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QUESTIONS PRESENTED

1. Whether the Establishment Clause of the United States Constitution deprives a state trial court of subject matter jurisdiction over an action for breach of contract and breach of fiduciary duties brought by pension plan participants against the religious organization that manages their pension funds.

2. Whether the Minnesota Court of Appeal's decision that the Freedom of Conscience Clause of the Minnesota Constitution deprives a Minnesota trial court of subject matter jurisdiction over an action brought by pension plan participants against the religious organization that manages their pension funds violates the Due Process, Equal Protection, and Freedom of Speech Clauses of the United States Constitution.

LIST OF PARTIES

The petitioners in this matter include The Reverend Thomas L. Basich, The Reverend Matthew J. Basich, Advent Lutheran Church, Robert D. Hansen, Jack R. Kirkham, Michael Edwin Simonds, Lyle M. Bohlig, Edgar Gentz, The Reverend Judith H. Boal, The Rev. Doctor Gilbert E. Doan, Jr., The Reverend David R. Liefeld, The Reverend Gary G. Scott, The Reverend Doctor George R. Muenich, The Reverend John C. Earp, Earl Eargle, The Reverend Russell E. Saltzman, The Reverend Carsten Judd Ludder, The Reverend Brooke Walker, The Reverend David A. Carlson, Matthew C. Headley, The Reverend William C. Lindholm, The Reverend Dean W. Hoferer, The Reverend Thomas J. Lewis, Raymond Ehrman, The Reverend John W. Lee, The Reverend Emmett L. Schmitt, Richard Herrig, The Reverend Kerry G. Beauchaine, The Reverend Donald W. Baron, The Reverend Phillip R. Swenson, The Reverend Robert E. Ward, The Reverend Frederick M. Archer, The Reverend Doctor Charles Dickson, The Reverend Edward Frank Balint, The Reverend James R. Corgee, The Reverend Arthur C. Sziemeister, The Reverend William Earl Jernigan, The Reverend David Gensch, The Reverend Richard C. Jones, The Reverend Waldo Allen Pierson, The Reverend James A. Gullickson, David Moris Carlson, Ph.D., The Reverend Russell Burr, The Reverend Charles L. Koester, The Reverend Jack W. Bailey, The Reverend Rodney Eberhardt, The Reverend Lowell Albee, Jr., The Reverend Allen K. Griep.

The respondents in this matter include the Board of Pensions, Evangelical Lutheran Church in America and the Evangelical Lutheran Church in America.

RULE 29.6 LIST

Neither the Board of Pensions, Evangelical Lutheran Church in America, nor the Evangelical Lutheran Church in America has any parents or subsidiaries.

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BOARD OF PENSIONS, EVANGELICAL LUTHERAN CHURCH IN AMERICA (ELCA), a Minnesota non-profit corporation; EVANGELICAL LUTHERAN CHURCH IN AMERICA (ELCA), a Minnesota non-profit corporation,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE MINNESOTA COURT OF APPEALS

Petitioners pray that a writ of certiorari issue to review the judgment, opinion, and order of the Minnesota Court of Appeals, which reversed the judgment of the District Court for Hennepin County, Minnesota.

OPINIONS BELOW

The District Court for Hennepin County, Minnesota denied Respondents' motions to dismiss or for summary judgment in an opinion dated February 7, 1994, which is included in the Appendix as Exhibit I. The District Court denied Respondents' second motions for summary judgment in an opinion dated April 18, 1995, which is included in the Appendix as Exhibit F.

The Minnesota Court of Appeals reversed the District Court's opinion of April 18, 1995 and dismissed this action in an opinion published as Basich v. Board of Pensions, 540 N.W.2d 82 (Minn. App. 1995), which is included in the Appendix as Exhibit B. The Supreme Court of Minnesota denied Petitioners' petition for review in an order dated January 25, 1996, which is included in the Appendix as Exhibit A.

STATEMENT OF JURISDICTION

The Minnesota Court of Appeals reversed the District Court's decision in an opinion published as Basich v. Board of Pensions, 540 N.W. 2d 82 (Minn. App. 1995), which is included in the Appendix as Exhibit B. The Supreme Court of Minnesota denied Petitioners' petition for review in an order filed on January 25, 1996, which is included in the Appendix as Exhibit A. This petition for certiorari is filed within 90 days of that date. This Court has jurisdiction to review the judgment of the Minnesota Court of Appeals by writ of certiorari pursuant to 28 U.S.C.§ 1257.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment of the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fifth Amendment of the United States Constitution, in relevant part, provides:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

The Fourteenth Amendment of the United State Constitution, in relevant part, provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 16 of Article I of the Minnesota Constitution provides:

> The enumeration of rights in this constitution shall not deny or impair others retained by and inherent in the people. The right of every man to worship God according to the dictates of his own conscience shall never be infringed; nor shall any man be compelled to attend, erect or support any place of worship, or to maintain any religious or ecclesiastical ministry, against his consent; nor shall any control of or interference with the rights of conscience be permitted, or any preference be given by law to any religious establishment or mode of worship; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace or safety of the state, nor shall any money be drawn from the treasury for the benefit of any religious societies or religious or theological seminaries.

Title 29 U.S.C. Section 1104 (a)(1)(A)-(D) of the Employee Retirement Income Security Act provides:

> Fiduciary Duties
>
> (a) Prudent man standard of care
>
> (1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and --
>
> (A) for the exclusive purpose of:
> (i) providing benefits to participants and their beneficiaries; and
> (ii) defraying reasonable expenses of administering the plan;
>
> (B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;
>
> (C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter or subchapter III of this chapter.

Title 26 U.S.C. Subchapter F - Exempt Organizations, Part I - General Rule § 501, in relevant part, provides:

> Exemption from tax on corporations, certain trusts, etc.
>
> (a) Exemption from taxation -- An organization described in subsection (c) or (d) or section 401(a) shall be exempt from taxation under this subtitle unless such exemption is denied under section 502 or 503 . . . .
>
> (c) List of exempt organizations . . . .
>
> (3) Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes . . .

STATEMENT OF THE CASE

The Board of Pensions, Evangelical Lutheran Church in America, and the Evangelical Lutheran Church in America (collectively "ELCA") are national Lutheran organizations that sponsor, manage, and administer a defined contribution pension plan ("Plan"), which they offer to local Lutheran congregations and their employees. These congregations are not required to accept the Plan and are free to obtain pension services from other organizations. Congregations that accept the Plan fund the Plan by contributing a percentage of their employees' income to their employees' individual accounts in the Plan. Petitioners are participants in the Plan who depend upon the Plan for their retirement benefits. Petitioners' individual accounts in the Plan are 100% vested. Each account is owned by an individual participant in the Plan -- not by the ELCA. Because the Plan is a defined contribution plan, it is the participants in the Plan -- and not the ELCA -- who bear the risk of investment loss.

The Plan is a "retirement income account" as defined by the Internal Revenue Code. See 26 U.S.C. § 403(b)(9). As such, it must be administered for the exclusive benefit of the participants in the Plan and their beneficiaries. See 26 U.S.C. § 401(a). Because the Plan is a "church plan," it is exempt from ERISA. See 29 U.S.C. § 1003(b)(2). However, through the plan document, the trust document, and the summary plan description, the ELCA and the Board of Pensions contractually promised to follow ERISA's fiduciary standards, which require pension plan fiduciaries to discharge their duties "solely in the interest of the participants and beneficiaries" and for the "exclusive purpose of providing benefits." 29 U.S.C. § 1104(a)(1)(A). The ELCA and the Board of Pensions also are subject to a similar duty of loyalty arising from the common law of trusts. See, e.g., Restatement of Trusts (Second) § 170(1) (1959).

Beginning in 1988, participants in the Plan were given the choice of investing their pension assets in two different categories of funds: social purpose funds and non-social purpose funds. Funds in the former category considered the "morality" of a potential investment when deciding how to invest pension funds; funds in the latter category made their investment decisions solely on the basis of traditional considerations of profit maximization consistent with safety. Petitioners had their pension monies invested in the non-social purpose funds.

In 1988, the ELCA began divesting the Plan's non-social purpose funds of securities of companies doing business in South Africa. The ELCA took this action in an attempt to further their religiously-motivated goal of opposing apartheid. The non-social purpose funds of the Plan suffered underperformance losses of more than $227 million between 1988 and 1991.

In response to the divestment, Petitioners filed this lawsuit in the District Court for Hennepin County, Minnesota on September 28, 1993, alleging that the ELCA breached contractual obligations and fiduciary duties when they divested the non-social purpose funds of securities of companies doing business in South Africa. Petitioners sought rescission from the Plan in order that they might invest their pension funds elsewhere. In November 1993, the ELCA brought motions to dismiss or for summary judgment, which the District Court denied on February 7, 1994. On March 6, 1995, just two months before this case was scheduled to go to trial, the ELCA brought new motions for summary judgment, arguing, for the first time, that their religious motivations in implementing the divestment policy in the non-social purpose funds deprived the District Court of subject matter jurisdiction over this action under the First Amendment of the United States Constitution and Section 16 of Article I of the

Minnesota Constitution. On April 18, 1995, the District Court denied those motions as well. The District Court said:

> There are several issue [sic] relating solely to contract concerns. The parties' expectations, rights and responsibilities to one another must be gleaned from the proceedings. The parties disagree as to the method of investment selection to be used by the Board and the reasonable expectations of the plaintiffs.

On April 25, 1995, the ELCA appealed the denial of their second motions for summary judgment to the Minnesota Court of Appeals. In their Notices of Appeal and Statements of the Case, the ELCA again asserted that a trial on the merits of Petitioners' claims would violate Respondents' rights under the First Amendment to the United States Constitution and Section 16 of Article I of the Minnesota Constitution. On November 28, 1995, the Minnesota Court of Appeals reversed the District Court and dismissed the case for lack of subject matter jurisdiction pursuant to the Establishment Clause of the United States Constitution and the Freedom of Conscience Clause of the Minnesota Constitution. On December 28, 1995, Petitioners filed a Petition for Review of the Decision of the Court of Appeals in the Minnesota Supreme Court. In an order filed January 25, 1996, the Minnesota Supreme Court denied Petitioners' Petition for Review.

Although the Establishment Clause issues raised here were argued before both the District Court and the Court of Appeals and included in the Petition for Review to the Minnesota Supreme Court, the issue of whether the Court of Appeals' interpretation of the Minnesota Constitution's Freedom of Conscience Clause violates the United States Constitution was not raised below. This Court has indicated, however, that the rule against deciding claims "not pressed or

passed upon below" may be a prudential restriction, not a jurisdictional one. See, e.g., Illinois v. Gates, 462 U.S. 213, 219 (1983) (discussing Terminiello v. Chicago, 337 U.S. 1 (1949) and Vachon v. New Hampshire, 414 U.S. 478 (1974)). Because the issues raised here are important ones involving fundamental rights protected by the United States Constitution, Petitioners ask the Court to exercise its discretion and grant certiorari.

REASONS FOR GRANTING THE WRIT

This case raises the important question of whether a religious organization may violate contractual and fiduciary duties without fear of liability so long as it is motivated by religious belief. The Minnesota Court of Appeals held that the trial court lacked subject matter jurisdiction over this matter because the ELCA's divestment policy was religiously motivated. The Court of Appeals based its decision on the Establishment Clause of the United States Constitution. In so doing, the Court of Appeals misinterpreted and misapplied decisions of this Court and radically extended the protection granted religious organizations by the Establishment Clause.

The Court of Appeals also based its decision on the Freedom of Conscience Clause of the Minnesota Constitution. The Court of Appeals' interpretation of the Freedom of Conscience Clause, however, violates Petitioners' rights under the Due Process, Equal Protection, and Freedom of Speech Clauses of the United States Constitution.

The Court should grant certiorari in this matter to correct the errors committed by the Court of Appeals and to clarify an area of law that affects every person who enters into a contract with a religious organization.

I. THE MINNESOTA COURT OF APPEALS MISINTERPRETED AND MISAPPLIED THE ESTABLISHMENT CLAUSE.

The Establishment Clause of the First Amendment is intended "to prevent, as far as possible, the intrusion of either [the church or the state] into the precincts of the other." Lemon v. Kurtzman, 403 U.S. 602, 614 (1971). In Lemon, this Court set out a tripartite test to determine whether government action violates the Establishment Clause. The Court held that government action survives an Establishment Clause challenge when: (1) it has a secular purpose; (2) its principal or primary effect neither advances nor inhibits religion; and (3) it does not foster an excessive entanglement with religion. Id. at 612-13. The basic principles articulated in Lemon have guided this Court's Establishment Clause decisions in over 30 cases. See Lee v. Weisman, 505 U.S. 577, 603 n.4 (1992) (Blackmun, J., concurring).

This case presents a unique set of circumstances never before directly addressed by this Court. Here, the Court of Appeals -- purporting to apply Lemon and other Supreme Court precedent -- held that the Establishment Clause deprives pension plan participants of their right to a trial on the merits in an action against the fiduciaries who sponsor, manage, and administer their pension accounts when those fiduciaries are religious organizations. The Court of Appeals' decision, however, rests on a misapplication of the Supreme Court precedent it cites.

First, the Court of Appeals misapplied Jones v. Wolf, 443 U.S. 595 (1979). In Jones, two factions of a congregation were in a dispute over who was entitled to possess and enjoy certain church property in Macon, Georgia. This Court held that it could, consistent with the Establishment Clause, apply "neutral principles of law" in a secular manner to resolve that dispute. In writing the opinion for the Court, Justice

Blackmun said: "There can be little doubt about the general authority of civil courts to resolve this question. The State has an obvious and legitimate interest in the peaceful resolution of property disputes, and in providing a civil forum . . . ." Id. at 602.[1]

Citing Jones, the Court of Appeals held that this case could not be decided on neutral principles of law because the District Court would be required to review the ELCA's "divestment and equivalency policies" and "examine church doctrine and organization to determine whether a breach of contract occurred in this case." B-6. This conclusion stems from a fundamental misinterpretation of the ELCA's contractual and fiduciary duties. The ELCA owed a duty of loyalty to Petitioners that required the ELCA to discharge their duties "solely in the interests" of Petitioners and "[f]or the exclusive purpose of providing benefits" to Petitioners. M-2; N-3; O-6, 7. Thus, because the contract required the ELCA to act solely in the interests of Petitioners, the District Court would not have to review church doctrine or the ELCA's motives to determine whether the ELCA breached their contractual and fiduciary duties. The District Court would only have to consider whether or not the ELCA acted solely in the interests of Petitioners, which it could do using neutral principles of law. Judicial review of Petitioners' claims, therefore, would be entirely consistent with Jones.

Second, the Court of Appeals misapplied this Court's holding in Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976). The Court of Appeals cited Serbian for the, proposition that "[i]f a claim involves core issues of

[1] In Jones, this Court also held that "a state is constitutionally entitled to adopt neutral principles of law as a means of adjudicating a church property dispute." Jones, 443 U.S. at 602. Minnesota formally adopted the neutral principles of law approach to resolving church property disputes in Piletich v. Deretich, 323 N.W. 2d 696, 700-01 (Minn. 1982).

ecclesiastical concern, the potential for government entanglement in religious matters prevents judicial review." B-5. Petitioners note first that this case does not involve core issues of ecclesiastical concern. More important, however, the holding in Serbian is much narrower than the Court of Appeals' decision suggests. In Serbian, this Court merely held that the First and Fourteenth Amendments:

> permit hierarchical religious organizations to establish their own rules and regulations for internal discipline and government, and to create tribunals for adjudicating disputes over these matters. When this choice is exercised and ecclesiastical tribunals are created to decide disputes over the government and direction of subordinate bodies, the Constitution requires that civil courts accept their decisions as binding upon them.

Serbian, 426 U.S. at 725. This case is not about "internal discipline" or "the government and direction of subordinate bodies" of a religious organization. Thus, Serbian simply does not apply.

Finally, the Court of Appeals misapplied the third-prong of the Lemon test. This prong requires that an exercise of governmental authority "not foster an excessive government entanglement with religion." Lemon, 403 U.S. at 613 (emphasis added). The Court of Appeals found that a trial on the merits would foster such an excessive entanglement. The Court in Lemon, however, defined excessive entanglement to require a "comprehensive, discriminating, and continuing state surveillance." Id. at 619. A trial on the merits of Petitioners' claims would in no way require such a surveillance. In such a trial, the District Court would merely apply neutral principles of law in a secular manner, and the trial would be limited in scope and time. Thus, there is absolutely no basis for the

Court of Appeals' determination that the trial of this case would create excessive entanglement.

This Court has long recognized that "the [First] Amendment embraces two concepts -- freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct is subject to regulation for the protection of society." Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940). According to Justice Stewart, "this distinction reflects the judgment that, on the one hand, government has no business prying into people's minds or dispensing benefits according to peoples' religious beliefs, and, on the other, that acts harmful to society should not be immune from proscription simply because the actor claims to be religiously inspired." McDaniel v. Paty, 435 U.S. 618, 643 at * (1978) (Stewart J., concurring).

The ELCA has been, and continues to be, unimpeded in the cerebral sphere. Administering a pension plan, however, is a secular activity. Investing billions of dollars in pension monies which belong to Plan participants and their beneficiaries is not a religious practice. The Board of Pensions performs no sacerdotal function. It takes in contributions and pays out benefits, just as any insurance company does. When the ELCA divested the Petitioners' pension accounts without Petitioners' consent, that conduct violated the law. The ELCA should not be immune from proscription. If, "under the cloak of religion," the ELCA is allowed to act with impunity, however, the ELCA will be outside and above the law. Cantwell v. Connecticut, 310 U.S. 296, 306 (1940); Reynolds v. United States, 98 U.S. 145, 166-67 (1878). This Court should grant certiorari to correct the errors committed by the Court of Appeals and to clarify an area of law that affects every person who enters into a contract with a religious organization, especially pension contracts.

II. THE MINNESOTA COURT OF APPEALS' INTERPRETATION OF THE FREEDOM OF CONSCIENCE CLAUSE VIOLATES THE UNITED STATES CONSTITUTION.

A. The Court Of Appeals' Decision Violates The Due Process Clause.

This Court has long recognized that the Due Process Clause protects an individual's right to have a claim heard by a court of law. See, e.g., Logan v. Zimmermann Brush Co., 455 U.S. 422, 429 (1982). When an individual's claim involves a fundamental right, an individual may be denied the right to have the claim heard only if there is "a countervailing state interest of overriding significance." Boddie v. Connecticut, 401 U.S. 371, 377 (1971); see also Ortwein v. Schwab, 410 U.S. 656, 662-63 (1973) (Douglas, J., dissenting).

The right to enforce another party's contractual obligations is a fundamental right protected by the Constitution. See, e.g., U.S. Const. Art. I, § 10; cf. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 432 (1968) (quoting Senator Trumbull's description of the Civil Rights Act of 1866 as protecting "the great fundamental rights" including "the right to enforce rights in the courts [and] to make contracts"). Thus, a state can take away an individual's right to enforce the contractual obligations of another only if the state has a compelling interest in doing so. See, e.g., Boddie, 401 U.S. at 377-78; Ortwein, 410 U.S. at 663 (Douglas, J., dissenting).

No compelling interest supports the Court of Appeals' denial of Petitioners' right of access to the courts. The Court of Appeals held that the Minnesota Constitution's Freedom of Conscience Clause required dismissal of Petitioners' complaint for lack of subject matter jurisdiction because (1) "there is no question that the ELCA acted pursuant to a sincerely held religious belief"; (2) "review of this case would burden the

exercise of the ELCA's religious belief"; and (3) neither "peace," "safety", nor "acts of licentiousness" are an issue. B-11. This decision, however, has deprived Petitioners of a civil forum to protect their rights.[2] Thus, under the Due Process Clause, the Court of Appeals' decision can stand only if Minnesota has a compelling interest in closing its courts to disputes in which a party acts pursuant to a sincerely held religious belief, review of the dispute would burden the exercise of such belief, and neither peace, safety, nor acts of licentiousness are at issue.

Petitioners agree that Minnesota has an interest in protecting religious beliefs, as expressed in the Freedom of Conscience Clause. Petitioners further agree that such interest can be compelling in certain situations and justify a denial of access to the courts. In this case, however, Minnesota's interest in protecting religious beliefs does not outweigh Petitioners' right of access to the Courts for the purpose of enforcing constitutionally-protected contractual obligations.

In its interpretation of the Establishment Clause, this Court has struck the appropriate balance between an individual's right of access to the courts and a religious organization's right to be free from government interference. The rules developed by the Court protect an individual's right to enforce contractual obligations when such enforcement will not require a court to determine a religious organization's true beliefs. The test applied by the Court of Appeals, however, tips the balance too far in favor of religious organizations and denies access to the courts whenever a religious organization's breach of contract is religiously-motivated (since in all such

[2] Petitioners could not sue in the federal courts under ERISA because the Plan is exempt from ERISA. See 29 U.S.C. § 1003(b)(2). Petitioners could not seek redress within the Lutheran Church because the Lutheran Church does not have a judicatory body legally empowered to adjudicate breaches of contract and breaches of fiduciary duty. That responsibility resides in the civil authority.

situations enforcement of the contract will "burden the exercise" of the religious organization's beliefs), except when "health," "safety" or "acts of licentiousness" are at issue. This interpretation of the Freedom of Conscience Clause is too broad. This Court, therefore, should grant certiorari in this matter to determine the constitutionally-permitted scope of the Freedom of Conscience Clause.

B. The Court Of Appeals' Decision Violates The Equal Protection Clause.

Although this Court has often dealt with the issue of access to the courts in terms of due process, it also has recognized that the right of access is protected by the Equal Protection Clause. See, e.g., Long v. District Court, 385 U.S. 192, 193-95 (1966); Boddie v. Connecticut, 401 U.S. 371, 385-86, 387-89 (1971) (Douglas, J., concurring in the result and Brennan, J., concurring in part); Richard v. Hinson, 70 F.3d 415, 417 (5th Cir. 1995), petition for cert. filed, 64 U.S.L.W. 3642 (March 11, 1996) (No. 95-1469). The Equal Protection Clause "keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike." Nordlinger v. Hahn, 505 U.S. 1, 10 (1992). In evaluating an equal protection claim, this Court has held that it must first determine the proper standard to use in reviewing the classification and it must then analyze the purpose of the classification to determine whether it satisfies that standard. See, e.g., United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 174 (1980). If a classification impinges upon a fundamental right, strict scrutiny is the proper level of review. See, e.g., Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 312 (1976); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 16 (1973).

Here, the Minnesota Court of Appeals' interpretation of the Freedom of Conscience Clause of the Minnesota

Constitution has the effect of creating two classes of pension plan participants: (1) participants (like Petitioners) whose plans are managed by religious organizations and (2) participants whose plans are managed by non-religious organizations. The former classification impinges upon a fundamental right -- the right of Petitioners to have access to the courts to have disputes regarding their contractual rights heard. See supra at 15. Thus, this classification can stand only if the purpose of the classification can withstand strict scrutiny. See, e.g., Murgia, 427 U.S. at 312; Rodriguez, 411 U.S. at 16. This classification cannot withstand strict scrutiny.

The only reason for discriminating between participants whose plans are managed by religious organizations and participants whose plans are not is to protect religious organizations' religious beliefs from infringement. When a religious organization freely enters into a contract and promises to provide the services that a secular organization provides, however, enforcement of the religious organization's promises cannot be said to infringe upon religious beliefs. Thus, when the ELCA has promised to provide the same retirement plan services provided by, for example, Merrill Lynch, it cannot complain when it is held to the same fiduciary standard as Merrill Lynch. A classification that discriminates between the customers of the ELCA and the customers of Merrill Lynch, therefore, is not rational, much less capable of surviving strict scrutiny. Thus, this Court should grant certiorari to determine whether the Court of Appeals' interpretation of the Freedom of Conscience Clause violates the Equal Protection Clause.

C. The Court Of Appeals' Decision Violates The Freedom Of Speech Clause.

It has long been recognized that forcing an individual to contribute money to a political purpose in which the individual

does not believe violates the Freedom of Speech Clause of the First Amendment. See, e.g., Abood v. Detroit Bd. of Educ., 431 U.S. 209, 234 & n.31 (1977) (quoting Thomas Jefferson's statement that "to compel a man to furnish money for the propagation of opinions which he disbelieves, is sinful and tyrannical"). That, however, is precisely the effect of the Court of Appeals' interpretation of the Minnesota Constitution. The Court of Appeals' decision allows the ELCA to use Petitioners' pension funds to support a divestment policy with which Petitioners disagree.[3] The Court of Appeals' interpretation of the Minnesota Constitution's Freedom of Conscience Clause, therefore, violates Petitioners' right to free speech. This Court should grant certiorari in order to prevent such deprivation from occurring.

[3] Petitioners agree that apartheid is morally wrong and should be opposed. They do not believe, however, that divestment was either an appropriate or effective means of opposing apartheid. Further, the real issue is that Petitioners believe that divestment itself is legally and morally wrong when imposed upon the pension accounts of Petitioners without Petitioners' consent.

CONCLUSION

For the foregoing reasons, Petitioners ask this Court to grant their petition for a writ of certiorari.

Respectfully submitted,

LYNN E. BASICH
Counsel of Record
3000 North Hamline Avenue
Roseville, MN 55113
(612) 633-3232

Robert C. Bell
PETERSON, BELL, CONVERSE, & JENSEN P.A.
3000 Metropolitan Centre
333 South Seventh Street
Minneapolis, MN 55402
(612) 342-2323

Craig W. Gagnon
Peter R. Bisio
OPPENHEIMER WOLFF & DONNELLY
3400 Plaza VII Building
45 South Seventh Street
Minneapolis, MN 55402
(612) 344-9300

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STATE OF MINNESOTA

IN SUPREME COURT

C8-95-882 and CX-95-883

The Reverend Thomas L. Basich, et al.,
Respondents,

vs.

Board of Pensions, Evangelical Lutheran Church in America (ELCA),

Appellant (C8-95-882),
Defendant (CX-95-883),

Evangelical Lutheran Church in America (ELCA),

Defendant (C8-95-882),
Appellant (CX-95-883).

ORDER

Based upon all the files, records and proceedings herein,

IT IS HEREBY ORDERED that the petition of The Reverend Thomas L. Basich, et al. for further review be, and the same is, denied.

IT IS FURTHER ORDERED that the requests of The Minnesota Civil Liberties Union, Professor John H. Langbein and The Church of the Nazarene, et al. to serve and file briefs as amici curiae are accordingly denied.

Dated: January 25, 1996

BY THE COURT:

s/A.M. Keith
Chief Justice

STATE OF MINNESOTA

IN COURT OF APPEALS

C8-95-882
CX-95-883

Hennepin County
District Court File
No. 9316711

Kalitowski, Judge

The Reverend Thomas L. Basich, et al.,

Respondents,

Robert C. Bell
Peterson, Bell, Converse & Jensen
310 Rosedale Towers
1700 West Highway 36
Roseville, MN 55113

Lynn E. Basich
3000 North Hamline Avenue
Roseville, MN 55113

vs.

Board of Pensions,
Evangelical Lutheran Church
in America (ELCA),

Appellant (C8-95-882),
Defendant (CX-95-883),

John D. French
Bonnie M. Fleming
Thomas H. Bennin
Brendan W. Randall
Faegre & Benson
2200 Norwest Center
90 South Seventh Street
Minneapolis, MN 55402

Evangelical Lutheran Church
in America (ELCA),

Defendant (C8-95-882),
Appellant (CX-95-883).

Robert H. Rydland
LeVander, Zotaley, Vander Linden & Rydland
720 Northstar West
625 Marquette Avenue
Minneapolis, MN 55402

Michael Stokes Paulsen
229 19th Avenue South
Minneapolis, MN 55455

Charles T. Nixon
800 Title Insurance Bldg.
400 Second Avenue South
Minneapolis, MN 55401
(For Amici Curiae
The Church of the
Nazarene, et al.)

Filed November 28, 1995
Office of Appellate Courts

SYLLABUS

The Establishment Clause of the First Amendment and the Freedom of Conscience Clause of the Minnesota Constitution deprive the district court of subject matter jurisdiction over a breach of contract action where respondent pastors allege that the Evangelical Lutheran Church of America wrongfully directed the church's board of pensions to invest pursuant to social and moral concerns rather than solely in the pastors' best financial interest.

Reversed.

Considered and decided by Kalitowski, Presiding Judge, Huspeni, Judge, and Davies, Judge.

OPINION

KALITOWSKI, Judge

Respondents, several Lutheran pastors, a lay employee and a Lutheran congregation (Pastors), filed this individual action for breach of contract and breach of fiduciary duty against appellants, the Evangelical Lutheran Church of America (ELCA) and the Board of Pensions of the Evangelical Lutheran Church of America (Board of Pensions). The ELCA and the Board of Pensions moved for summary judgment on the grounds that the First Amendment of the United States Constitution and the Freedom of Conscience Clause of the Minnesota Constitution deprive the court of subject matter jurisdiction in this dispute. The district court denied the motion.

FACTS

The Pastors participate in defined contribution pension accounts, contributed to by their congregations and administered by the Board of Pensions. The Pastors allege that the Board of Pensions has mismanaged funds by investing and divesting pursuant to social concerns rather than solely in the economic best interests of the plan participants.

The ELCA and the Board of Pensions are organized as Minnesota nonprofit corporations. The ELCA is comprised of 65 Synods governing 11,000 congregations. Each Synod elects representatives to the Churchwide Assembly, the highest legislative authority in the ELCA. When the Churchwide Assembly is not in session, the ELCA is governed by the Church Council. The Board of Pensions was established by the ELCA in 1988 to provide retirement income and benefits to Lutheran pastors and lay church employees. The ELCA Constitution provides that the Board of Pensions is to manage and operate the pension fund with the "design and policy adopted by the Churchwide Assembly." The Board of Pension's Articles of Incorporation provide that the Board is

> organized and shall be operated exclusively for religious purposes and exclusively for the benefit of and to assist in carrying out the purposes of the ELCA.

The ELCA Churchwide Assembly and Council have final authority and control over policies implemented by the Board of Pensions.

In 1977 the Lutheran World Federation Assembly declared that apartheid was so contrary to the Lutheran understanding of believers in Christ that it must be rejected as a matter of faith itself. The ELCA expressed its opposition to apartheid by passing a resolution to "see that none of our

ELCA pension funds will be invested in companies doing business in South Africa." The Board of Pensions responded in 1988 by adopting the "equivalency policy," whereby the Board of Pensions agreed to divest (and refrain from making new investments) in companies with South African holdings whenever the conditions of risk and return were equal between stocks and bonds held by the Board. The equivalency policy governed investment decisions until its repeal in 1993.

A dissenting group of Lutherans led by respondent Reverend Thomas Basich disagreed with the Churchwide Assembly's divestment policy. Basich and others published articles opposing the ELCA's decision to use its assets as a political weapon and condemning the Board of Pensions for "acquiescing" to the Churchwide Assembly's pressure on the issue of apartheid. Basich requested that he and others be allowed to withdraw their pension funds. The Board of Pensions denied this request. In response, Basich and others filed a derivative action suit against the Board of Pensions. This court held the Pastors did not have standing to bring a derivative suit. Basich v. Board of Pensions of Evangelical Lutheran Church in Am., 493 N.W.2d 293, 296 (Minn. App. 1992) The Pastors then filed this action for individual relief on the grounds of breach of contract and breach of fiduciary duty.

ISSUES

1. Does the First Amendment of the United States Constitution prevent the district court from exercising jurisdiction over this dispute?

2. Does the Freedom of Conscience Clause of the Minnesota Constitution prevent the district court from exercising jurisdiction over this dispute?

ANALYSIS

A motion for summary judgment shall be granted when there is no issue of material fact and a party is entitled to judgment as a matter of law. Fabio v. Bellomo, 504 N.W.2d 758, 761 (Minn. 1993). None of the facts relevant to a determination of this summary judgment motion are disputed. The only remaining issue, therefore, is whether the federal or state constitution deprives the court of subject matter jurisdiction of the Pastors' claim. This issue is a question of law. A reviewing court is not bound by and need not give deference to a trial court's decision on a purely legal issue. Frost-Benco Elec. Ass'n v. Minnesota Pub. Utils. Comm'n, 358 N.W.2d 639, 642 (Minn. 1984).

The ELCA and the Board of Pensions allege that the First Amendment to the United States Constitution deprives the district court of subject matter jurisdiction. The First Amendment provides that

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * *.

U.S. Const. amend. I. The Establishment Clause cannot easily be reduced to a single test. Rosenberger v. Rector & Visitors of the Univ. of Va., 115 S. Ct. 2510, 2528 (1995). The Supreme Court has held that for an exercise of governmental authority to be valid under the Establishment Clause, it must: (1) have a secular purpose; (2) neither inhibit nor advance religion as its primary effect; and (3) not create excessive entanglement between church and state. Lemon v. Kutzman, 403 U.S. 602, 612-13, 91 S. Ct. 2105, 2111 (1971). The Supreme Court has also applied the "principles of neutrality" test, requiring that civil courts hear only disputes which can be

determined on the basis of neutral principles of law. Jones v. Wolf, 443 U.S. 595, 602, 99 S. Ct. 3020, 3025 (1979).

Applying the Lemon factors, the parties do not allege that Minnesota contract and trust law lacks a secular purpose or that its primary effect inhibits or advances religion. Therefore, we need only consider whether review of this dispute would cause excessive entanglement between church and state and whether, under Jones, this dispute can be resolved by neutral principles of law.

Whether government action causes excessive entanglement depends on the nature of the intrusion into religious administration, the character and purpose of the involved institutions and the resulting relationship between the religious authority and government. Lemon, 403 U.S. at 614-15, 91 S. Ct. at 2112. If a claim involves core issues of ecclesiastical concern, the potential for government entanglement in religious matters prevents judicial review. Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696, 721-23, 96 S. Ct. 2372, 2386-87 (1976).

This court has held that the Establishment Clause prevents civil courts of Minnesota from considering a breach of contract claim brought by a pastor against her former church. Black v. Snyder, 471 N.W.2d 715, 720 (Minn. App. 1991), review denied (Minn. Aug. 29, 1991). In Black, a Lutheran associate pastor filed a discrimination charge against her supervising pastor alleging sexual harassment. Id. at 717-18. Shortly thereafter, the congregation voted to discharge Black and Black sued the church for, among other claims, breach of contract. Id. at 718. This court held that hearing Black's breach of contract claim would cause excessive entanglement because it would require the court to examine issues of church doctrine and governance and would require court review of the church's motives. Id. at 720.

This court has also refused to hear a defamation case to avoid excessive entanglement under the Establishment Clause.

Schoenhals v. Mains, 504 N.W.2d 233, 236 (Minn. App. 1993). The Schoenhals alleged that their pastor defamed them by communicating to the congregation that they had been poor parishioners. Id. at 234-35. The pastor alleged that his statements were based in the Bible and in the church's religious beliefs and practices. Id. at 235. This court found that while the pastor's statement appeared unrelated to church doctrine, court review of the defamatory statements would require an inquiry into the church's motives and disciplinary matters. Id. at 236. Accordingly, this court found that to prevent excessive entanglement, the district court must not hear the case. Id.

The Pastors argue that a review of this case will not require the court to entangle itself in issues of Lutheran doctrine. We disagree. Delegates to the Churchwide Assembly, the highest legislative authority of the Lutheran church, voted to divest funds from companies with holdings in South Africa and directed the Board of Pensions to implement the divestment policy. While the Board of Pensions is required to prudently invest its holdings, the ELCA created the Board to both provide for pastors' retirement needs and assist the ELCA in accomplishing doctrinal goals. The ELCA enacted the equivalency policy in an effort to further its social and doctrinal goals of opposing apartheid. Accordingly, any review of the Board of Pensions' divestment and equivalency policies would entangle the court in reviewing church doctrine and policy.

In addition, the district court would be required to examine church doctrine and organization to determine whether a breach of contract occurred in this case. The plan document is the primary "contract" between the parties. It provides that the Board of Pensions shall discharge its duties with the care that a prudent person would use in the conduct of an enterprise of like character with like aims. Thus, the district court would be required to examine the ELCA's

"aims" before it could determine the breach of contract issue. Such inquiry into church motives is forbidden by the Establishment Clause of the United States Constitution.

The Pastors also contend that this case can be resolved on neutral principles of contract and trust law. We disagree. The flaw in this contention is illustrated by the Pastors' admission that the ELCA could properly prohibit investments by the Board of Pensions in morally obnoxious commercial activity such as prostitution or pornography. There are no neutral principles of law that would enable a district court to distinguish between investments that Lutheran doctrine should find to be morally acceptable and those that it should find to be morally unacceptable. We conclude that the Establishment Clause of the First Amendment deprives the district court of subject matter jurisdiction in this dispute because review of this issue would require the district court to look beyond neutral principles of contract and trust law and entangle itself in issues of church doctrine.

The ELCA and the Board of Pensions allege that the Freedom of Conscience Clause of the Minnesota Constitution deprives the district court of subject matter jurisdiction. Article I, section 16 of the Minnesota Constitution provides that

> [t]he right of every man to worship God according to the dictates of his own conscience shall never be infringed * * * nor shall any control of or interference with the rights of conscience be permitted, or any preference be given by law to any religious establishment or mode of worship; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices

> inconsistent with the peace or safety of the state * * *.

The Freedom of Conscience Clause affords greater protection for religious liberties against government action than the federal constitution. State v. Hershberger, 462 N.W.2d 393, 397 (Minn. 1990). In determining whether government action violates the Freedom of Conscience Clause, Minnesota courts consider whether: (1) the objector's belief is sincerely held; (2) the action burdens the exercise of religious beliefs; (3) the state's interest is compelling; and (4) the state action uses the least restrictive means. Hill-Murray Fed'n of Teachers v. Hill-Murray High Sch., 487 N.W.2d 857, 865 (Minn. 1992). Under the Freedom of Conscience Clause, only governmental interests in "peace or safety" and against "acts of licentiousness" will excuse government imposition on religious freedom. Hershberger, 462 N.W.2d at 397.

This court has applied the Freedom of Conscience Clause recently to a discrimination claim brought by a lay church employee against the Eckankar church. Geraci v. Eckankar, 526 N.W.2d 391 (Minn. App. 1995), review denied (Minn. Mar. 14, 1995), cert. denied, 116 *S.* Ct. 75 (1995). Carol Geraci was a computer programmer for the Eckankar church who claimed that the church discriminated against her on the basis of gender. Id. at 395. The church alleged that Geraci was terminated for failing to work harmoniously with her coworkers in disregard of the sacred teachings of Eckankar. Id. This court concluded that while the state's interest in eradicating discrimination is compelling, it could not question Eckankar's basis for decisions claimed to be doctrinally related because to do so may compel the church to conform its religious beliefs with the government's or with the majority culture's beliefs. Id. at 399.

An analysis of the four elements of the Freedom of Conscience Clause test leads us to conclude that allowing the

district court's review of this matter would violate the Freedom of Conscience Clause. First, there is no question that the ELCA acted pursuant to a sincerely held religious belief by enacting the equivalency policy. The Lutheran World Federation declared that apartheid must be rejected as a matter of the Lutheran faith itself. Similarly, the Constituting Convention of the ELCA passed a resolution stating that divestment was the appropriate response to the "sin of apartheid."

Second, review of this case would burden the exercise of the ELCA's religious beliefs. If the civil courts were allowed to rescind pension plan contracts every time a group of dissenting participants disagreed with the Board of Pensions' social or moral investment strategies, the ELCA's ability to express its faith through social and moral investment would be substantially compromised. Additionally, as in Geraci, to review this case, the district court would be required to question the ELCA's basis for a decision that it contends was founded in Lutheran doctrine. Judicial inquiry into issues of church doctrine is itself a substantial burden. Id. Accordingly, a review of this case would burden the ELCA's exercise of religious beliefs.

Third, the government does not have a compelling interest in reviewing this case. The Pastors argue that there is an important governmental interest in providing a forum for review of this matter. We disagree. The forum best suited to review the Pastors' grievance is the Churchwide Assembly. The delegates to the Churchwide Assembly debated the appropriateness of the equivalency policy at length. As the highest legislative authority in the ELCA, the Churchwide Assembly's determination on this issue is final. The civil courts need not hear this case to ensure public "peace or safety" and the Pastors' breach of contract action does not allege an act of "licentiousness," as required by the Minnesota Freedom of Conscience Clause.

Because the Pastors have not alleged a compelling governmental interest in hearing this dispute, we need not address the fourth element of the Freedom of Conscience Clause test. We conclude that a review of this case would substantially burden the ELCA's exercise of religion. Therefore, the Freedom of Conscience Clause of the Minnesota Constitution deprives the district court of subject matter jurisdiction in this dispute.

DECISION

The district court erred in denying appellants' motion for summary judgment on the grounds that the court did not have subject matter jurisdiction. The district court's decision is reversed and this matter is dismissed pursuant to the Establishment Clause of the First Amendment and the Freedom of Conscience Clause of the Minnesota Constitution.

Reversed.

s/Thomas Kalitowski
11-17-95

STATE OF MINNESOTA

IN COURT OF APPEALS

The Reverend Thomas L. Basich, et al.,
Respondents,

vs.

Board of Pensions, Evangelical Lutheran Church in America (ELCA),

Appellant (C8-95-882),
Defendant (CX-95-883),

Evangelical Lutheran Church in America (ELCA),

Defendant (C8-95-882),
Appellant (CX-95-883).

ORDER

C8-95-882
CX-95-883

Considered and decided by Toussaint, Chief Judge, Parker, Judge, and Kalitowski, Judge.

BASED UPON THE FILE, RECORD AND PROCEEDINGS, AND FOR THE FOLLOWING REASONS:

These appeals were filed April 25, 1995. Appellants seek review of an April 18, 1995 order denying their motions to dismiss and for summary judgment on the ground that the district court lacks subject matter jurisdiction. This court

consolidated the appeals and questioned whether they should have been taken from a resulting judgment, because the April 18 order specifically directs entry of judgment. Respondents filed a motion to dismiss, arguing that the denial of appellants' motions is not immediately appealable. Appellants oppose the motion and seek an award of attorney fees.

An order denying defendant's motion for summary judgment is immediately appealable when defendant's motion is based on the district court's lack of subject matter jurisdiction. McGowan v. Our Savior's Lutheran Church, 527 N.W.2d 830, 833 (Minn. 1995). Respondents argue that the denial of appellants' motions is not appealable because the district court has subject matter jurisdiction over their contract claims. Respondents' argument pertains to the merits of the appeal, not to the issue of appealability. Because appellants' motions were based on a claim that the district court lacks subject matter jurisdiction to review matters allegedly involving religious beliefs and practices, appellants are entitled to immediate review of the denial of the motions.

Generally, where an otherwise appealable order specifically directs entry of judgment, the proper appeal is from the judgment. See Saric v. Stover, 451 N.W.2d 65 (Minn. App. 1990). Appellants indicate that judgment was entered pursuant to the April 18 order on May 11, 1995. Under the unique circumstances of this case, and in the interests of judicial economy, we will allow the appeal to proceed. The appeal is limited to the issue of subject matter jurisdiction. We decline to award attorney fees against respondents.

IT IS HEREBY ORDERED:

1. Respondents' motion to dismiss is denied.

2. Appellants' requests for attorney fees are denied.

3. The appeals shall proceed pursuant to the rules of civil appellate procedure.

4. The Clerk of the Appellate Courts shall provide copies of this order to the Honorable Harry Seymour Crump, counsel of record, and the court administrator.

Dated: May 30, 1995

BY THE COURT

s/Edward Toussaint
Chief Judge

AW/dr

STATE OF MINNESOTA **DISTRICT COURT**

COUNTY OF HENNEPIN **FOURTH JUDICIAL DISTRICT**

CASE TYPE 3: CONTRACT

The Reverend Thomas L. Basich,
The Reverend Matthew J. Basich,
Advent Lutheran Church,
Robert D. Hansen,
Jack R. Kirkham,
Michael Edwin Simonds,
Lyle M. Bohlig,
Edgar Gentz,
The Reverend Judith H. Boal,
The Reverend Doctor Gilbert E. Doan, Jr.,
The Reverend David R. Liefeld,
The Reverend Gary G. Scott,
The Reverend Doctor George R. Muenich,
The Reverend William J. Cork,
The Reverend John C. Earp,
Earl Eargle,
The Reverend Russell E. Saltzman,
The Reverend Carsten Judd Ludder,
The Reverend Brooke Walker,
The Reverend David A. Carlson,
Matthew C. Headley,
The Reverend William C. Lindholm,
The Reverend Dean W. Hoferer,
The Reverend Thomas J. Lewis,
Raymond Ehrman,
The Reverend John W. Lee,
The Reverend Emmett L. Schmitt,
Richard Herrig,

NOTICE OF APPEAL TO COURT OF APPEALS

Trial Court Case No. 93-16711

DATE OF ORDER: April 18, 1995

The Reverend Kerry G. Beauchaine,
The Reverend Donald W. Baron,
The Reverend Phillip R. Swensson,
The Reverend Robert E. Ward,
The Reverend Frederick M. Archer,
The Reverend Doctor Charles Dickson,
The Reverend Edward Frank Balint,
The Reverend James R. Corgee,
The Reverend Arthur C. Sziemeister,
The Reverend William Earl Jernigan,
The Reverend David Gensch,
The Reverend Richard C. Jones,
The Reverend Waldo Allen Pierson,
The Reverend James A. Gullickson,
David Morris Carlson, Ph.D.,
The Reverend Russell Burr,
The Reverend Charles L. Koester,
The Reverend Jack W. Bailey,
The Reverend Rodney Eberhardt,
The Reverend Lowell Albee, Jr.,
The Reverend Allen K. Griep,

Plaintiffs,

vs.

Board of Pensions, Evangelical Lutheran Church in America (ELCA); and
Evangelical Lutheran Church in America (ELCA),

Defendants.

TO: Clerk of the Appellate Court
Minnesota Judicial Center
St. Paul, MN 55155

PLEASE TAKE NOTICE that defendant Evangelical Lutheran Church in America appeals to the Court of Appeals of the State of Minnesota from an order of the Court filed on April 18, 1995, denying defendant's motion for dismissal for lack of subject matter jurisdiction.

Dated: April 24, 1995

Attorneys for Defendant the Evangelical Lutheran Church in America:

LeVANDER, ZOTALEY, VANDER LINDEN & RYDLAND

By s/s
Robert H. Rydland, #94948
625 Marquette Avenue
720 Northstar West
Minneapolis, Minnesota 55402
612/339-6841

Attorneys for Defendant Board of Pensions:

Faegre & Benson
Bonnie M. Fleming, #30077
Thomas H. Bennin, #120789
Eric E. Jorstad, #216987
2200 Norwest Center
90 South Seventh Street
Minneapolis, MN 55402
612/336-3000

Attorneys for Plaintiffs:
The Reverend Thomas L. Basich, et al.

Robert C. Bell, #6361
Peterson, Bell, Converse & Jensen, P.A.
310 Rosedale Towers
1700 West Highway 36
Roseville, MN 55113
612/631-8489

Attorneys for Plaintiffs:
The Reverend Thomas L. Basich, et al.

Lynn E. Basich, #149226
3000 North Hamline Avenue
Roseville, MN 55113-1698
612/633-3232

STATE OF MINNESOTA
IN COURT OF APPEALS

CASE TITLE:

Board of Pensions, Evangelical Lutheran Church in America (ELCA); and Evangelical Lutheran Church in America (ELCA),	**STATEMENT OF THE CASE OF APPELLANT EVANGELICAL LUTHERAN CHURCH IN AMERICA**
Appellants,	TRIAL COURT CASE NUMBER: 93-16711
vs.	
The Reverend Thomas L. Basich, The Reverend Matthew J. Basich, Advent Lutheran Church, Robert D. Hansen, Jack R. Kirkham, Michael Edwin Simonds, Lyle M. Bohlig Edgar Gentz, The Reverend Judith H. Boal, The Reverend Doctor Gilbert E. Doan, Jr., The Reverend David R. Liefeld, The Reverend Gary G. Scott, The Reverend Doctor George R. Muenich, The Reverend William J. Cork, The Reverend John C. Earp, Earl Eargle, The Reverend Russell E. Saltzman, The Reverend Carsten Judd Ludder, The Reverend Brooke Walker, The Reverend David A. Carlson,	APPELLATE COURT CASE NUMBER:

Matthew C. Headley,
The Reverend William C. Lindholm,
The Reverend Dean W. Hoferer,
The Reverend Thomas J. Lewis,
Raymond Ehrman,
The Reverend John W. Lee,
The Reverend Emmett L. Schmitt,
Richard Herrig,
The Reverend Kerry G. Beauchaine,
The Reverend Donald W. Baron,
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The Reverend Robert E. Ward,
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The Reverend Edward Frank Balint,
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The Reverend Arthur C. Sziemeister,
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The Reverend Waldo Allen Pierson,
The Reverend James A. Gullickson,
David Morris Carlson, Ph.D.,
The Reverend Russell Burr,
The Reverend Charles L. Koester,
The Reverend Jack W. Bailey,
The Reverend Rodney Eberhardt,
The Reverend Lowell Albee, Jr.,
The Reverend Allen K. Griep,

Respondents.

---

1. Fourth Judicial District, Hennepin County District Court, the Honorable Harry Seymour Crump presiding.

2. This appeal is from an Order Denying Defendants' Motions for Summary Judgment dated April 18, 1995 in which the Evangelical Lutheran Church in America's motion to dismiss for lack of subject matter jurisdiction was denied. Such an order "is appealable as of right independent of Rule 103.03." Judd v. State by Humphrey, 488 N.W.2d 507, 508 (Minn. Ct. App. 1992). See also McGowan v. Our Savior's Lutheran Church, Minnesota Supreme Court (Finance and Commerce, February 17, 1995, p. 19, February 24, 1995, p. 19); Hunt v. Nevada State Bank, 285 Minn. 77, 172 N.W.2d 292, 300 (1969), cert. denied, 397 U.S. 1010 (1970); Walker and Co., Ltd. v. Lawrence, 416 N.W.2d 154, 156 (Minn. Ct. App. 1987); Snow v. Snow, 369 N.W.2d 581, 583 (Minn. Ct. App. 1985).

3. Appeal and Error -- Jurisdictional Question: First Amendment of the United States Constitution (the religion clauses) and Article I, Section 16 of the Minnesota Constitution (the freedom of conscience clause).

4. The plaintiffs instituted this action seeking rescission of their alleged contracts with the defendant Board of Pensions of the Evangelical Lutheran Church in America (the "Board") and transferral of their pension funds held and managed by the Board. The plaintiffs claim that adoption of an "equivalency policy" by the Board breached their alleged contract with the Board and the Evangelical Lutheran Church in America (the "Church"). The "equivalency policy" provided that whenever the conditions of risk and return are equal in the choice among stocks and bonds, the stocks or bonds of companies not doing business in South Africa could be given preference. Plaintiffs also claim that certain actions taken with respect to proxy voting violated an alleged duty to consult the plaintiffs prior to taking those actions. The plaintiffs also claim that the Board is controlled by the Church.

The defendants contend that the Trial Court is prohibited from asserting subject matter jurisdiction over this matter

pursuant to the First Amendment of the United States Constitution and Article 1, § 16, the Freedom of Conscience Clause, of the Minnesota Constitution.

The defendants further contend that this matter is a dispute over the proper interpretation and application of Lutheran doctrine, a matter which should be and has been resolved within the Church at its highest levels. This is not a matter over which the secular courts have jurisdiction. Nor is the adoption of the "equivalency policy" a breach of duty such a policy having been specifically determined to be consistent with fiduciary duty. No contract exists between the Church and the plaintiffs concerning pension plan administration. The plaintiffs, having incurred no losses and suffered no material breach, are not entitled to rescission.

After an earlier summary judgment order dismissing two of the plaintiffs' three claims, only their "contract" claims survived. Upon the defendants' further motions for summary judgment following discovery, the trial court refused to dismiss the action for lack of subject matter jurisdiction. The trial court also refused to grant summary judgment on the "contract" claims because of factual issues.

5. The subject of this appeal is the trial court's refusal to dismiss plaintiffs' action for lack of subject matter jurisdiction. Under the religion clauses of the First Amendment to the United States Constitution and the freedom of conscience clause of the Minnesota Constitution, the secular courts should not become enmeshed in this matter which involves issues of "theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them."

6. A transcript is required.

7. Oral argument is requested.

8. Formal briefs are necessary.

Dated: April 24, 1995

Attorneys for Appellant the Evangelical Lutheran Church in America:

LeVANDER, ZOTALEY, VANDER LINDEN & RYDLAND

By s/s

Robert H. Rydland, #94948
625 Marquette Avenue
720 Northstar West
Minneapolis, Minnesota 55402
612/339-6841

Attorneys for Appellant
Board of Pensions:

Faegre & Benson
Bonnie M. Fleming, #30077
Thomas H. Bennin, #120789
Eric E. Jorstad, #216987
2200 Norwest Center
90 South Seventh Street
Minneapolis, MN 55402
612/336-3000

Attorneys for Respondent:
The Reverend Thomas L. Basich, et al.

Robert C. Bell, #6361
Peterson, Bell, Converse & Jensen, P.A.
310 Rosedale Towers
1700 West Highway 36
Roseville, MN 55113
612/631-8489

Attorneys for Respondent:
The Reverend Thomas L. Basich, et al.

Lynn E. Basich, #149226
3000 North Hamline Avenue
Roseville, MN 55113-1698
612/633-3232

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

Case Type 3: Contract

The Reverend Thomas L. Basich,
The Reverend Matthew J. Basich,
Advent Lutheran Church,
Robert D. Hansen,
Jack R. Kirkham,
Michael Edwin Simonds,
Lyle M. Bohlig,
Edgar Gentz,
The Reverend Judith H. Boal,
The Reverend Doctor Gilbert E. Doan, Jr.,
The Reverend David R. Liefeld
The Reverend Gary G. Scott,
The Reverend Doctor George R. Muenich,
The Reverend William J. Cork,
The Reverend John C. Earp,
Earl Eargle,
The Reverend Russell E. Saltzman,
The Reverend Carsten Judd Ludder,
The Reverend Brooke Walker,
The Reverend David A. Carlson,
Matthew C. Headley,
The Reverend William C. Lindholm,
The Reverend Dean W. Hoferer,
The Reverend Thomas J. Lewis,
Raymond Ehrman,
The Reverend John W. Lee,
The Reverend Emmett L. Schmitt,
Richard Herrig,

NOTICE OF APPEAL TO COURT OF APPEALS

TRIAL COURT CASE NUMBER: 93-16711

DATE OF ORDER: April 18, 1995

The Reverend Kerry G. Beauchaine,
The Reverend Donald W. Baron,
The Reverend Phillip R. Swensson,
The Reverend Robert E. Ward,
The Reverend Frederick M. Archer,
The Reverend Doctor Charles Dickson,
The Reverend Edward Frank Balint,
The Reverend James R. Corgee,
The Reverend Arthur C. Sziemeister,
The Reverend William Earl Jernigan,
The Reverend David Gensch,
The Reverend Richard C. Jones,
The Reverend Waldo Allen Pierson,
The Reverend James A. Gullickson,
David Moris Carlson, Ph.D.,
The Reverend Russell Burr,
The Reverend Charles L. Koester,
The Reverend Jack W. Bailey,
The Reverend Rodney Eberhardt,
The Reverend Lowell Albee, Jr.,
The Reverend Allen K. Griep,

Plaintiffs,

vs.

Board of Pensions, Evangelical
Lutheran Church in America (ELCA); and
Evangelical Lutheran Church in America (ELCA),

Defendants.

TO: Clerk of the Appellate Courts
Minnesota Judicial Center
St. Paul, MN 55155

Please take notice that defendant the Board of Pensions of the Evangelical Lutheran Church in America appeals to the Court of Appeals of the State of Minnesota from an order of the court filed on the date shown above, denying defendant's motion to dismiss for lack of subject matter jurisdiction, on the grounds that trial of the above-titled action would violate defendant's rights under the First Amendment of the United States Constitution and Article I, § 16 of the Minnesota Constitution.

Dated: April 24, 1995.

FAEGRE & BENSON PROFESSIONAL
LIMITED LIABILITY PARTNERSHIP

s/s

Bonnie M. Fleming, #30077
Thomas H. Bennin, #120789
Eric E. Jorstad, #216987
2200 Norwest Center
90 South Seventh Street
Minneapolis, Minnesota 55402
612/336-3000

Attorneys for Defendant, Board of
Pensions of the Evangelical Lutheran
Church in America

Attorneys for plaintiffs:

Robert C. Bell, #6361
PETERSON, BELL, CONVERSE & JENSEN
310 Rosedale Towers
1700 West Highway 36
Roseville, MN 55113
612/631-8489

Lynn E. Basich, #149226
1036 Woodlynn Avenue
Roseville, MN 55113
612/633-3232

Attorneys for defendant
Evangelical Lutheran Church in America:

Robert H. Rydland, # 94948
LeVANDER, ZOTALEY, VANDER LINDEN
& RYDLAND
625 Marquette Avenue
720 Northstar West
Minneapolis, MN 55402
612/339-6841

MLL272B7.WP5

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

The Reverend Thomas L. Basich, et al.,

Plaintiff,

vs.

Board of Pensions, Evangelical Lutheran Church in America (ELCA); and Evangelical Lutheran Church in America (ELCA),

Defendants.

D.C. File No. 93-16711

ORDER DENYING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

Robert C. Bell and Lynn E. Basich appeared on behalf of plaintiffs. Bonnie M. Fleming and Thomas H. Bennin appeared on behalf of Defendant Board of Pensions. Robert H. Rydland appeared on behalf of Defendant ELCA.

The above-captioned matter came on for hearing of Monday, April 3, 1995 before the Honorable Harry Seymour Crump at Brookdale, Division 2, 6125 Shingle Creek Parkway, Brooklyn Center, Minnesota 55430.

Defendant Board of Pensions of the Evangelical Lutheran Church in America (the "Board of Pensions") and Defendant Evangelical Lutheran Church in America (the "ECLA") each brought Motions for Summary Judgment pursuant to Minn.R. Civ. P. 56. Defendant ELCA also brought a Motion to Dismiss for lack of subject matter jurisdiction pursuant to Minn. R. Civ. P. 12.08(c).

The Court, having heard the arguments of counsel, having reviewed the memoranda and affidavits submitted by the

parties, having considered all of the files, records and proceedings in this action, and being otherwise fully advised,

IT IS HEREBY ORDERED:

1. Defendant Board of Pensions' motion for summary judgment is DENIED.

2. Defendant Evangelical Lutheran Church in America's motion for summary judgment is DENIED.

3. Defendant Evangelical Lutheran Church in America's motion to dismiss for lack of subject matter jurisdiction is DENIED.

4. Defendants' joint motion for sanctions is DENIED.

5. Defendant Board of Pensions' motion to compel more complete answers to expert witness interrogatories is denied.

There being no just reason for delay,

LET JUDGMENT BE ENTERED ACCORDINGLY,
BY THE COURT:

s/s
Harry Seymour Crump
District Court Judge

DATED: April 18, 1995

MEMORANDUM

Summary judgment is a proceeding designed to determine if issues of fact exist, but, it is not a trial of the issues of fact. Corwine v. Crow Wing County, 244 N.W.2d 482 (Minn. 1976). Rule 56.03 of the Minnesota Rule of Civil Procedure provides that "[j]udgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law." While summary judgment is entitled to secure a just, speedy, and inexpensive disposition, it is not designed as a substituted for a court or jury trial where there are material factual issues to be determined. Vieths v. Throp Finance Co., 232 N.W.2d 776 (Minn. 1975).

There are several issue relating solely to contract concerns. The parties' expectations, rights and responsibilities to one another must be gleaned from the proceedings. The parties disagree as to the method of investment selection to be used by the Board and the reasonable expectations of the plaintiffs.

For the foregoing reasons, the summary judgment motions brought by Board of Pensions and the Evangelical Lutheran Church are denied.

H.S.C.

STATE OF MINNESOTA **DISTRICT COURT**

COUNTY OF HENNEPIN **FOURTH JUDICIAL DISTRICT**

CASE TYPE 3: CONTRACT

The Reverend Thomas L. Basich, et al. COURT FILE NO.: 93-16711

Plaintiffs,

vs.

Board of Pensions, Evangelical Lutheran Church in America (ELCA); and Evangelical Lutheran Church in America (ELCA),

Defendants.

NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT OF DEFENDANT EVANGELICAL LUTHERAN CHURCH IN AMERICA

TO: PLAINTIFFS THE REVEREND THOMAS L. BASICH, ET AL. AND THEIR ATTORNEYS, ROBERT C. BELL, PETERSON, BELL, CONVERSE & JENSEN, SUITE 327, LUTHERAN BROTHERHOOD BLDG., 2780 NORTH SNELLING AVENUE, ROSEVILLE, MN 55113, AND LYNN BASICH, 1036 WOODLYNN AVENUE, ROSEVILLE, MN 55113.

NOTICE OF MOTION

PLEASE TAKE NOTICE that the undersigned will bring the following Motion at a hearing to be held before The Honorable Harry Seymour Crump, Judge of District Court, at

Brookdale, Division 2, 6125 Shingle Creek Parkway, Brooklyn Center, Minnesota 55430, at 12:00 Noon on April 3, 1995, or as soon thereafter as counsel may be heard.

MOTION

Defendant Evangelical Lutheran Church in America (the "Church") hereby moves the Court pursuant to Minn. R. Civ. P. 56.02 and 12.08(c) for judgment dismissing all claims asserted by Plaintiffs against the Church in the above-entitled action. Plaintiffs' First Amended Complaint fails to state a cognizable claim against the Church and this Court lacks jurisdiction of the subject matter pursuant to the First Amendment of the United States Constitution and the freedom of conscience clause of the Minnesota Constitution.

This motion is based upon all of the files, records and proceedings in this action, and upon a Memorandum of Law to be filed in accordance with Minn. Gen. R. Prac. 115.03.

Dated: March 6, 1995 **LeVANDER, ZOTALEY, VANDER LINDEN & RYDLAND**

By s/s
Robert H. Rydland (#94948)
625 Marquette Avenue
720 Northstar West
Minneapolis, MN 55402
Telephone: 612/339-6841

ATTORNEYS FOR DEFENDANT EVANGELICAL LUTHERAN CHURCH IN AMERICA

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT
Case Type 3: Contract

The Reverend Thomas L. Basich,
The Reverend Matthew J. Basich,
Advent Lutheran Church,
Robert D. Hansen,
Jack R. Kirkham, Court File No. 93-16711
Michael Edwin Simonds,
Lyle M. Bohlig,
Edgar Gentz, **NOTICE**
The Reverend Judith H. Boal, **OF MOTION**
The Reverend Doctor Gilbert E. Doan, Jr., **AND MOTION**
The Reverend David R. Liefeld, **FOR SUMMARY**
The Reverend Gary G. Scott, **JUDGMENT OF**
The Reverend Doctor George R. Muenich, **DEFENDANT**
The Reverend William J. Cork, **BOARD OF**
The Reverend John C. Earp, **PENSIONS OF**
Earl Eargle, **THE EVANGELICAL**
The Reverend Russell E. Saltzman, **LUTHERAN CHURCH**
The Reverend Carsten Judd Ludder, **IN AMERICA**
The Reverend Brooke Walker,
The Reverend David A. Carlson,
Matthew C. Headley,
The Reverend William C. Lindholm,
The Reverend Dean W. Hoferer,
The Reverend Thomas J. Lewis,
Raymond Ehrman,
The Reverend John W. Lee,
The Reverend Emmett L. Schmitt,
Richard Herrig,
The Reverend Kerry G. Beauchaine,
The Reverend Donald W. Baron,

The Reverend Phillip R. Swensson,
The Reverend Robert E. Ward,
The Reverend Frederick M. Archer,
The Reverend Doctor Charles Dickson,
The Reverend Edward Frank Balint,
The Reverend James R. Corgee,
The Reverend Arthur C. Sziemeister,
The Reverend William Earl Jernigan,
The Reverend David Gensch,
The Reverend Richard C. Jones,
The Reverend Waldo Allen Pierson,
The Reverend James A. Gullickson,
David Moris Carlson, Ph.D.,
The Reverend Russell Burr,
The Reverend Charles L. Koester,
The Reverend Jack W. Bailey,
The Reverend Rodney Eberhardt,
The Reverend Lowell Albee, Jr., and
The Reverend Allen K. Griep,

Plaintiffs,

vs.

Board of Pensions, Evangelical
Lutheran Church in America (ELCA); and
Evangelical Lutheran Church in America (ELCA),

Defendants.

TO: Plaintiffs and their attorneys Robert C. Bell, 310 Rosedale Towers, 1700 West Highway 36, Roseville, MN 55113-4015, and Lynn E. Basich, 3000 North Hamline Avenue, Roseville, MN 55113-1698; and

Defendant Evangelical Lutheran Church in America and its attorney, Robert H. Rydland, 625 Marquette Avenue, 720 Northstar West, Minneapolis, MN 55402:

PLEASE TAKE NOTICE that at a hearing to be held before The Honorable Harry Seymour Crump, Judge of District Court, at Brookedale, Division 2, 6125 Shingle Creek Parkway, Brooklyn Center, Minnesota 55430, at 12:00 noon, on April 3, 1995, or as soon thereafter as counsel may be heard, defendant Board of Pensions of the Evangelical Lutheran Church in America ("Board of Pensions") will move pursuant to Minn. R. Civ. P. 56 for summary judgment dismissing with prejudice all claims asserted by plaintiffs against the Board of Pensions in the above-entitled action. The grounds for this motion are as follows:

1. Plaintiffs' claim for breach of contract and request for rescission fails to state a claim upon which relief can be granted against the Board of Pensions because, as a matter of law, no contract exists between plaintiffs and the Board of Pensions. Under well-established law, a trust relationship -- not a contractual relationship -- exists between trust beneficiaries such as plaintiffs and a trustee such as the Board of Pensions. Plaintiffs' claim that defendants breached their fiduciary duties to plaintiffs by investment decisions motivated by social and political criteria and by voting shares of stock held by the Plan without consulting the beneficiaries. Plaintiffs did adopt and implement an Equivalency Policy which did apply to all funds held by the Board of Pensions. The Board of Trustees of the Board of Pensions are required to vote the shares of stock held by the Plan and have the sole power to do so. As a matter of law the actions of the Board of Trustees were proper. Accordingly no breach of fiduciary duty exists.

2. Because no contract exists, plaintiffs cannot state a claim for breach of contract against the Board of Pensions

arising from the Board of Pensions' administration of pension funds. Moreover, even if a contract did exist between plaintiffs and the Board of Pensions, rescission is not available to remedy the grievances which plaintiffs allege, because there was no material breach of contract and rescission would cause more harm to the other plan beneficiaries than it would benefit these plaintiffs. Plaintiffs, claim should therefore be dismissed with respect to the Board of Pensions.

3. Further, plaintiffs' claim involves a doctrinal dispute within the Evangelical Lutheran Church in America ("ELCA"), a disagreement as to the proper interpretation and application of religious doctrines, over which this court cannot constitutionally assert jurisdiction.

4. This motion is based upon all of the files, records and proceedings in this action, upon the affidavits of John G. Kapanke and David G. Adams and upon the Memorandum of Law of Defendant Board of Pensions of the Evangelical Lutheran Church in America in Support of Motion for Summary Judgment.

DATED: March 6, 1995 FAEGRE & BENSON
Professional Limited Liability
Partnership

s/s
Bonnie M. Fleming, # 30077
Thomas H. Bennin # 120789
Eric E. Jorstad #216987
Brendan W. Randall # 223475
2200 Norwest Center
90 South Seventh Street
Minneapolis, Minnesota 55402
(612) 336-3000

Attorneys for Defendant Board
of Pensions of the Evangelical
Lutheran Church in America

MTT0EDE5.WP5

STATE OF MINNESOTA DISTRICT COURT
COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

The Reverend Thomas L. Basich,
The Reverend Matthew J. Basich, File No: CT 93-16711
Advent Lutheran Church,
Robert D. Hansen,
Jack R. Kirkham, **ORDER**
Michael Edwin Simonds,
Lyle M. Bohlig,
Edgar Gentz,
The Reverend Judith H. Boal,
The Reverend Doctor Gilbert e. Doan, Jr.,
The Reverend David R. Liefeld
The Reverend Gary G. Scott,
The Reverend Doctor Greg R. Muenich,
The Reverend William J. Cork,
The Reverend John C. Earp,
Earl Eargle,
The Reverend Russell E. Saltzman,
The Reverend Carsten Judd Ludder,
The Reverend Brooke Walker,
The Reverend David A. Carlson,
Matthew C. Headley,
The Reverend William C. Lindholm,
The Reverend Dean W. Hoferer
The Reverend Thomas J. Lewis
Raymond Ehrman
The Reverend John W. Lee,,
The Reverend Emmett L. Schmitt,
Richard Herrig
The Reverend Kerry G. Beauchaine,
The Reverend Donald W. Baron,

Plaintiffs,

vs.

Board of Pensions, Evangelical
Lutheran Church in America (ELCA)
and Evangelical Lutheran Church in America (ELCA),

Defendants.

The above-entitled matter came for a hearing before the Honorable Harry Seymour Crump on December 16, 1993, at the Hennepin County Government Center in the City of Minneapolis, Minnesota, upon cross motions for summary judgment.

Plaintiffs were represented by Robert Bell, Esq. Defendant Board of Pensions of the Evangelical Lutheran Church, was represented by Bonnie M. Fleming, Esq. Robert H. Rydland, Esq. appeared on behalf of the Defendant Evangelical Lutheran Church in America.

Based upon the files, records and proceedings held herein,

IT IS HEREBY ORDERED:

1. Defendants' motion for summary judgment is denied as to Count I of the Plaintiff's Complaint.
2. Count II and Count III of the Plaintiff's Complaint are hereby dismissed as being Moot.
3. The attached memorandum is incorporated herein by reference.

LET JUDGMENT BE ENTERED ACCORDINGLY

BY THE COURT:

Dated: 2-7-94

s/s
The Honorable Harry Seymour Crump
Judge of District Court

MEMORANDUM

FACTS

Defendant Evangelical Lutheran Church ("ELCA") is a nonprofit corporation organized pursuant to the Minnesota Nonprofit Corporation Act, Minn. Stat. Chapter 317A. Board of Pensions of the Evangelical Lutheran Church ("Board of Pensions") is a Minnesota nonprofit corporation which was formed for the purpose of providing pension and welfare benefits for pastors, associates in ministry, and lay persons working within the structure of the ELCA. The Board of Pensions was created and incorporated pursuant to the ELCA's Constitution. A 21-member Board of Trustees acts as the Board of Pensions' board of directors. Those individuals are elected by the ELCA churchwide assembly. The Board of Pensions administers retirement income accounts.

Plaintiffs, with the exception of Advent Lutheran Church, and Lyle Bohlig and Edgar Gentz, are all members of the ELCA Regular Pension Plan. They are ordained Lutheran Pastors and lay church workers. Advent Lutheran Church is the employer of Rev. Thomas Basich and Rev. Matthew Basich. Plaintiffs Bohlig and Gentz are lay members of ELCA congregations.

On or about June 1988, the Board of Pensions adopted a Policy Statement on South Africa. The Policy Statement provides:

> Whenever the conditions of risk and return are equivalent in the choice among Alternative Funds securities held by the Board on behalf of plan members, or available for purchase, the Board of Pensions has directed that the holdings in companies with South African investments

> will be divested, and similarly, investments in these companies will not be made.

On or about September 28, 1993, plaintiffs filed this case in Hennepin County District Court. Count I of the Complaint is a claim for breach of contract. Count II of the Complaint is a declaratory judgment action and Count III is for Injunctive relief.

On or about November 12, 1993, the Board of Pensions adopted a series of Resolutions relating to South Africa. The first resolution eliminated the South Africa screen from the Social Purpose Funds. The second resolution repealed the Policy statement in its entirety. The third resolution recommended that the church council amend the Plan to provide that retired Plan members be allowed to transfer their interests out of the south Africa Free Funds and to eliminate the South Africa Free Funds if the aggregate value of those funds fall below $20 million.

STANDARD OF REVIEW

Summary judgment is a proceeding designed to determine if issues of fact exist, but, it is not a trial of the issues of fact. Corwine v. Crow Wing County, 244 N.W.2d 482 (Minn. 1976). Rule 56.03 of the Minnesota Rules of Civil Procedure provides that "(j)udgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a mater of law." While summary judgment is intended to secure a just, speedy, and inexpensive disposition, it is not designed as a substitute for a court or jury trial where there are material factual issues to be determined. Vieths v. Thorp Finance Co., 232 N.W.2d 776 (Minn. 1975).

When viewing a motion for summary judgment, the court views the facts in light of the most favorable to the nonmoving party. Campion v. Wright County, 347 N.W.2d 289 (Minn. 1984). The moving party carries the burdens of proof and persuasion to establish the absence of any genuine issue of material fact. Johnson v. Winthorp Laboratories Division of sterling Drug, Inc., 190 N.W.2d 110 (Minn. Ct. App. 1984). Any doubt regarding the existence of a genuine fact issue will be resolved in favor of its existence. Rathburn v. W.T. Grant Co., 219 N.W.2d 641 (Minn. 1972).

Rule 56.05 is designed to require parties to produce sufficient facts in support of their pleading allegations. Bush v. City of Lakefield, 399 N.W.2d 169, 172 (Minn. Ct. 1987). Rule 56.09 states that '[w]hen a motion for summary judgment is made and supported as provided in Rule 56, an adverse party may not rest upon the mere averments or denials of the adverse party's pleading but must present specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party."

ANALYSIS

Defendants first argue that Count I of the Complaint for breach of contract fails as a matter of law because the relationship of the parties is that of a trust relationship and rescission of the contract, the relief sought, is not available.

Plaintiffs allege that the defendants promised the plaintiffs that they would follow the fiduciary provisions of the Employee Retirement Income Security Act ('ERISA') in administering the ELCA Regular Pension Plan. Specifically, plaintiffs argue that ERISA requires that a plan be managed solely in the interest of the participants for the purpose of providing benefits to participants and the defendants breached

this promise by adding an additional purpose to the ELCA Regular Pension Plan.

This issue turns on the relationship of the parties. The fiduciary provisions of ERISA have been incorporated essentially verbatim in the ELCA Plan Document, the ELCA Trust Document and the Summary Plan Description governing the ELCA Regular Pension Plan which was given to each plaintiff as a participant in the ELCA Plan. This gives some credence to the plaintiffs contract theory. However, the relationship between the parties is not clear to this Court at this time. Thus, material facts are in dispute as to what the parties relationship is. Material facts as those that will affect the results or outcome of the case, depending upon its resolution. Zappa v. Fahey, 245 N.W.2d 258 (Minn. 1976). Therefore, defendants motion for summary judgment as to Count I of the plaintiffs complaint is denied.

Defendants next argue that Count II and Count III of the plaintiffs Complaint fail as a matter of law because those claims are now moot. This Court agrees.

Count II of the plaintiffs Complaint is for declaratory relief and Count III is for injunctive relief. Both Counts relate to the Board of Pensions' political and social investing. However, on November 12, 1993, after this case was filed, the Board of Pensions Executive Committee voted to eliminate the Policy Statement which was the only social policy which affected the alternative Funds.

To render a declaratory judgment, a justiciable controversy must exist. De Antoni v. City of Bloomington, 421 N.W.2d 744, 746 (Minn. Ct. App. 1988). The purpose of injunctive relief is preventive, protective, and prohibitory and as a rule will not issue against discontinued acts unless there are grounds to believe that the conduct or violations will resume. Johnson v. NM Farms Barlett, Inc., 226 Neb. 680, 414 N.W.2d 256, 263 (1987).

In the instant case, there is no longer a present actual controversy since the issue of social and political investments no longer exists. The resolutions on this issue were passed in November 1993, two months after the filing of this litigation. Further, plaintiffs present no facts or evidences to lead this Court to believe that the Board of Pensions will resume this activity. Therefore, Count II and Count III, are dismissed as being moot.

CONCLUSION

For the forgoing reasons, this Court must deny summary judgment as to Count I and dismiss Count II and III as moot.

H.S.C

BOARD OF PENSIONS
EVANGELICAL LUTHERAN
CHURCH IN AMERICA
800 Marquette Ave-sue. Suite 1050 • Minneapolis, Minnesota 55402
• 612-333-7651

CC
Exhibit L
Part 3
Page 1

November 8, 1989

TO: Members of the Church Council

FROM: John G. Kapanke, President

During the October 12-14, 1989 Board of Trustees meeting, the Trustees devoted a considerable amount of time to the Churchwide Assembly resolution regarding divestment. Following extensive discussion, the Board of Trustees voted to adopt a response to the Churchwide Assembly resolution.

Enclosed is the action of the Board of Pensions in response to the Churchwide Assembly call for divestment (Tab 1). In addition, enclosed is a compendium of background information pertaining to the divestment issue. This information reflects matters that were earnestly discussed and debated by the Trustees at their October, 1989 meeting. The Trustees believe that a full understanding of their response is not possible in the absence of an understanding of the background information. In reviewing this material, a special emphasis should be noted of the following:

MINNESOTA PRUDENT TRUSTEE RULE

Minnesota law, which governs the pension plans, requires a trustee to observe the prudent trustee rule in the investment of trust assets unless the governing document provides otherwise. Consequently, the prudent trustee rule will apply to the ELCA pension plans unless it is expressly overridden. Amending the plan documents to override the prudent trustee rule could threaten the tax-deferred status of the pension plans and lead to litigation by Members asserting violation of their contract rights.

EXCLUSIVE BENEFIT RULE

The federal "exclusive benefit rule" applies to the ELCA pension plans because they are tax-deferred retirement income accounts for purposes of section 403 (b) (9) of the Internal Revenue Code. The exclusive benefit rule requires that plan assets be invested in accordance with the prudent trustee standard, and it cannot be overridden by the plan documents or state law. If the plan documents were amended to require the trustees to divest without regard to the prudent trustee rule, then it is likely that the plans' tax-deferred status would be revoked.

INDIVIDUAL LIABILITY

If the plan fiduciaries divested in accordance with 16.5l.C87j regardless of the effect of divestment upon the value of plan assets, then the plan fiduciaries will be exposed to individual liability for losses to the portfolio. In determining whether and to what extent divestment may have caused damage to the plan portfolios, a court is likely to employ hindsight and compare the performance of the ELCA plan portfolios with the performance of similar defined contribution plans.

BREACH OF FAITH

Plan Members, including Predecessor ALC and LCA retirees and current ELCA members with vested accumulations, have relied on promises in pension plan documents and supporting materials relative to the management of the plan assets. Amendments to the plans to permit (or require) social investing, including divestment, would result in a breach of faith with Plan Members. If the Predecessor ALC and LCA pension plans and the ELCA plans are amended to permit (or require) social investing, Plan Members must be offered the opportunity to withdraw their fund balances in lieu of being forced to continue participation in plans where the guidelines have been unilaterally changed.

NEXT STEPS

In addressing the tax and fiduciary law issues raised by the adoption of 16.5l.C87j, the Church Council should be aware that if the Trustees were placed under a mandate to divest all securities of companies with investments in South Africa by September 1, 1991, a group of Members is certain to commence litigation against the Trustees and the ELCA. That litigation would be wide ranging, expensive, emotionally devastating and, perhaps, inconclusive.

If the Church Council believes that the divestment action of the Churchwide Assembly must or should be pursued, then the Board submits that the most efficient means of so doing would be to obtain an IRS ruling as to whether a proposed amendment implementing 16.51.C87j (and generally requiring the Trustees to follow the directions of the ELCA with respect to social investing) would, if adopted, cause the plans to lose their tax-deferred status. If, as seems likely, the IRS rules that

adoption of such an amendment would result in loss of tax-deferred status, then the entire issue of divestment and social investing must be revisited.

On the other hand, if the IRS were to rule that such an amendment would not cause loss of the pension plans' tax-deferred status, then the next step would be for the Trustees, or a group of Members, to request the Hennepin County, Minnesota, District Court to rule on the state law questions involved so that the plan fiduciaries would be protected from exposure to individual liability if they moved ahead with an aggressive program of divestment.

Of primary importance in any litigation, whether commenced by the Plan Members or by the Board in seeking a judicial interpretation, is the cost of such litigation and/or court involvement which will be substantial. The question of who pays for these legal proceedings is of paramount concern to the Trustees. The Plan Members should not be expected to bear the cost of litigation which is commenced as a direct result of a Churchwide Assembly resolution. If litigation is initiated by Plan Members over the divestment issue, it is likely that the courts would rule that the cost of such litigation should be borne by the trusts. The Trustees believe that Plan Members should not be burdened with such costs.

The Board of Pensions wishes to work closely with the Church Council in analyzing issues presented by the Churchwide Assembly resolution on divestment.

JGK/ss

Enclosures

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

Case Type 3: Contract

The Reverend Thomas L. Basich, Court File No. 93-16711
The Reverend Matthew J. Basich,
Advent Lutheran Church,
Robert D. Hansen,
Jack R. Kirkham,
Michael Edwin Simonds,
Lyle M. Bohlig,
Edgar Gentz,
The Reverend Judith H. Boal,
The Reverend Doctor Gilbert E. Doan, Jr.,
The Reverend David R. Liefeld
The Reverend Gary G. Scott, **MEMORANDUM OF**
The Reverend Doctor George R. Muenich, **BOARD OF**
The Reverend William J. Cork, **PENSIONS OF**
The Reverend John C. Earp, **THE EVANGELICAL**
Earl Eargle, **LUTHERAN CHURCH IN**
The Reverend Russell E. Saltzman, **AMERICA IN**
The Reverend Carsten Judd Ludder, **SUPPORT OF**
The Reverend Brooke Walker, **MOTION FOR**
The Reverend David A. Carlson, **SUMMARY JUDGMENT**
Matthew C. Headley,
The Reverend William C. Lindholm,
The Reverend Dean W. Hoferer,
The Reverend Thomas J. Lewis,
Raymond Ehrman,
The Reverend John W. Lee,
The Reverend Emmett L. Schmitt,
Richard Herrig,
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David Moris Carlson, Ph.D.,
The Reverend Russell Burr,
The Reverend Charles L. Koester,

missions which are less well off by having the medical-dental plan financed as a percentage of salary. (Id.) The ELCA wishes to ensure that its clergy, layworkers and their families receive adequate benefits regardless of where they are called to serve the ELCA. (Almen Aff., ¶ 29)

7. The Board of Pensions is a non-profit corporate entity which offers certain benefit plans to clergy and lay workers of the ELCA. (Kapanke Affidavit, ¶ 2)

8. The benefit plans offered by the Board of Pensions include lifetime medical and dental benefits, disability benefits, lump sum and monthly survivor benefits and lifetime pension benefits for the clergy/layworker and his/her spouse. (Kapanke Aff., ¶ 7) The benefits comprising each of the benefit plans offered by the Board of Pensions are offered as a "package." (Id.)

9. A congregation is not required to enroll its employees in any benefit plan offered by the Pension Board. (Kapanke Aff., ¶ 9) But if the congregation does enroll an employee, it must enroll its employee in all of the benefits comprising a benefit "package" or none of them.[3] (Kapanke Aff., ¶ 7)

10. Because a minister will only very rarely spend his/her career serving one congregation, the ELCA offers its 11,000 congregations and other affiliated employers a benefits package which is totally portable within the ELCA. (Almen Aff., ¶¶ 9 and 29.) The ELCA benefits package has been designed to continuously provide for plan members and their beneficiaries as they move from one ELCA entity to another. (Almen Aff., ¶ 29.)

11. The Board of Pensions is responsible to three groups -- the ELCA, which sponsors Board programs; the ELCA entities which purchase Board's benefits package for their employees; and plan members and their beneficiaries. (Kapanke Aff., ¶¶ 2, 5 and 6 and Exs. A and B)

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[3] Except that as of January 1, 1995, a plan member who has certain other group coverage may waive the ELCA medical-dental coverage.

12. The congregations who employed the forty-seven individual plaintiffs who are members of the Board's regular pension plan enrolled the plaintiffs in the ELCA benefit plans through the Board of Pensions. (Kapanke Aff., ¶ 11)

13. All forty-seven of the individual plaintiffs have had at least one regular pension account with the Board, consisting of funds which were contributed to the Board by their sponsoring employers on their behalf. (Kapanke Aff., ¶ 11) In addition to regular pension accounts, some individual plaintiffs also have employee voluntary contribution accounts with the Board. (Id.) The voluntary contribution accounts consist of funds they have contributed individually and voluntarily; their total pension account with the Board is the combined total of employer and employee-voluntary contributions. (Id.)

14. The lifetime pension benefits offered by the Board of Pensions is for a lifetime annuity. Retirees are ensured of a guaranteed minimum pension and they receive excess earnings as incremental annuities. (Adams Aff., ¶ 3; Kapanke Aff., ¶ 15)

APPLICATION FOR TRANSFER OF MEMBERSHIP
to the
PENSION AND OTHER BENEFITS PROGRAM
of the
Evangelical Lutheran Church in America
to be effective January 1, 1988

Name _____ (First) (Middle) (Last) Address _____ _____ City _____ State _____ Zip _____	Social Security Number Clergy ☐ Lay ☐ AELC Associate in Ministry ☐ ELCA Synod Affiliation Birth Date | Sex: F ☐ M ☐ Day Phone ( ) Ordination Date (if applicable)
Merging Church Body: AELC ☐ ALC ☐ LCA ☐ Former Membership Number	
Present Marital Status: Single ☐ Married ☐ Separated ☐ Divorced ☐ Widowed ☐	
Name of Spouse (if applicable) _____ (First) (Middle) (Last)	Spouse's Birth Date
Spouse's Social Security Number	Date of Marriage
Name of Spouse's Employer, if spouse is Employed by an ELCA Organization	

INVESTMENT ALTERNATIVES

The ELCA Board of Pensions makes available five funds for the investment of pension contributions to your regular account. All incoming Regular Contributions (Required and Supplemental) must be invested in one or more of these funds.

You can choose how the contributions will be allocated among the funds. You may designate any combination; however, you must designate your choices in 10% increments and the total of the increments must equal 100%. Before the decision is made, it is recommended by the Board of Pensions that the member review the "ELCA Regular Pension Funds Booklet on Investment Choices." The booklet provides information concerning the investment objectives, accounting rules, and transfer rights for each of the funds.

The following elections regarding the investment of future incoming Regular Contributions can be changed at quarterly intervals:

Percentage (10% Increments)	Fund
_____%	Bond Fund
_____%	Balanced Fund
_____%	Equity Fund
_____%	Social Purpose Bond Fund
_____%	Social Purpose Equity Fund
100 % TOTAL	

NOTE: If you do not designate a choice, 100% of your incoming Regular Contributions will be invested in the ELCA Bond Fund.

(PLEASE COMPLETE PAGE 2)

4 132940

SALARY INFORMATION

	Salary-Paying Organization A	Salary-Paying Organization B
Name		
Address		
1. Cash Salary		
a. Annual Base Salary	$	$
b. Clergy Social Security Tax Allowance (if provided)		
2. Total of (1a + 1b)	$	$
3. Housing: Check Applicable Box ☐ Cash Housing Allowance OR ☐ 35% of Line 2 if Parsonage or other housing is provided		
4. Household Furnishings and Utilities Allowances (only if Parsonage is provided)		
5. DEFINED COMPENSATION [Total of (2) + (3) + (4)]	$	$

If more than two salary-paying organizations will participate, please use a separate sheet.

CHECK BOX, IF APPLICABLE
- ☐ On Leave from Call/Appointment
- ☐ Receiving Severance Benefits from a National Church Office, Synod, or LCUSA

PENSION CONTRIBUTIONS

The employer must contribute Required Contributions for each Member whom the employer enrolls. The amount of the Required Contribution is determined as a percent of defined compensation.

The employer may make Supplemental Contributions for members. No such contributions are required as a condition for participation in the Pension and Other Benefits Program. However, some employers may be obligated by employment agreements to make additional contributions on behalf of members (such as those who elected to maintain the pension contribution rate at, or increase it to, 12%).

REQUIRED PENSION CONTRIBUTIONS			SUPPLEMENTAL CONTRIBUTIONS
Attained Age on December 31, 1987	Contribution Rate	Check According to Your Age	Please Enter Contribution Rate or Amount
53 or over	12%	—	
45 - 54	11	—	_____ %
35 - 44	10	—	OR
34 or under	9	—	$ _____ per month

(PLEASE COMPLETE PAGE 3)

BENEFICIARY DESIGNATION

The individual(s) named as Beneficiary(ies) below shall receive the following benefits:

I. REGULAR PENSION PLAN ACCUMULATIONS

If after my death and after all benefits have been funded for my Surviving Spouse* or if there is no Surviving Spouse, for my Eligible Surviving Child(ren) (under age 21 or totally and permanently disabled prior to attaining age 21) any portion remains of my pension accumulation from my ELCA Regular Pension Plan Account, then the individual(s) named below as my Beneficiary(ies) who survive(s) me shall be entitled to lump-sum payment(s) from my Account. I understand that if I do not designate my child(ren) as a Beneficiary, the ELCA Regular Pension Plan will not provide my child(ren) any benefit unless my spouse predeceases me and my child(ren) is under age 21 at my death (or was totally and permanently disabled prior to age 21).

*A married member may name a primary Beneficiary other than a Surviving Spouse if the Spouse gives written consent on a form available from the Board of Pensions. If such an election is made and the member dies leaving orphaned children who are under age 21 or disabled, they will not be entitled to any special benefit from the ELCA Regular Pension Plan.

NAME	DATE OF BIRTH	RELATIONSHIP	SOCIAL SECURITY NUMBER, IF ANY	PERCENT SHARE
				100%

II. LUMP-SUM SURVIVOR BENEFIT

If I should die while covered for a Lump-sum Survivor Benefit, then the individual(s) named below as my Beneficiary(ies) who survive(s) me shall be entitled to payment(s).

NAME	DATE OF BIRTH	RELATIONSHIP	SOCIAL SECURITY NUMBER, IF ANY	PERCENT SHARE
				100%

If your Beneficiary is not designated on an approved form filed prior to your death, your Beneficiary will be the person or persons who survive you in the first of the following four classes in which there is a survivor, share and share alike:

1. Your surviving legal spouse.
2. Your surviving children.

   However, if a child of yours dies before you die and that deceased child leaves surviving descendants (your grandchildren, or, in the rare event that a grandchild is also deceased, your great-grandchildren) those descendants will take the share that their deceased parent would have taken had he/she not died before you died.
3. Your surviving parents.
4. Your surviving brothers and sisters.

If none of the above survives you, your Beneficiary will be your estate.

Date _____ Signature of Member X _____

(PLEASE COMPLETE PAGE 4)

MEDICAL AND DENTAL BENEFITS COVERAGE FOR SPOUSE AND CHILDREN

Spouses (including separated spouses) and eligible children are automatically enrolled for medical-dental benefits coverage at the same the member is enrolled. Eligible children include unmarried (1) natural children, (2) step-children living in the same household as the member, (3) legally-adopted children, and (4) individuals placed in the member's household as a step toward legal adoption by the member. Such children must be (a) under age 19, (b) under age 25 if enrolled as a full-time student in an educational institution approved by the Board, or (c) totally and permanently disabled as the result of a disability incurred prior to the child's attainment of age 21 and while the child was covered under the ELCA or predecessor church medical plan.

List spouse and children for whom coverage will be provided. For a child age 19 or older, please indicate the child's status as "student" or "disabled."

Name(s)	Birth Date	Status	Sex	Name of other Medical-Dental Coverage (if applicable)
			F☐ M☐	
			F☐ M☐	
			F☐ M☐	
			F☐ M☐	
			F☐ M☐	

I hereby agree to participate in the Pension and Other Benefits Program of the Evangelical Lutheran Church in America, and agree to be bound by the terms and conditions of the plan documents of the several employee-benefit plans.

Date _____ Signature of Sponsored Member: X _____

We hereby declare the above-named employee to be eligible for participation in the Pension and Other Benefits Program of the Evangelical Lutheran Church in America, and we approve the above agreement for the employee to participate, and agree to sponsor the employee, in such program.

Participating Employer (Congregation/Organization): _____

Date _____ By (Signature): X _____

Title: _____

When completed, please return to:

ELCA BOARD OF PENSIONS
P.O. Box 59029
Minneapolis, Minnesota 55459-0029

Form 181

4 132943

Plan Document

ELCA Regular Pension Plan

BOARD OF PENSIONS
Evangelical Lutheran Church in America
800 Marquette Ave., Suite 1050 • Minneapolis, MN 55402 • (612) 333-7651

August 24-25, 1993

2 148581

(d) Court System. In the event a Member has exhausted the appeals procedure set forth in Sec. 11-04(a), (b), and (c) and is dissatisfied with the final decision of the governing board of the ELCA Board of Pensions, the Member may initiate legal action in the Minnesota Fourth Judicial District Court, Hennepin County. Any removal of such action must be to the United States Court for the District of Minnesota.

Sec. 11.05 Correction of Errors. It is recognized that in the operation and administration of the Regular Pension Plan certain mathematical and accounting errors may be made or mistakes may arise for several reasons including by reason of factual errors in information supplied to the ELCA Board of Pensions or to the Regular Pension Trustees. The ELCA Board of Pensions shall have the power to cause such equitable adjustments to be made to correct such errors as the ELCA Board of Pensions, in its sole discretion, considers appropriate. Such adjustments shall be final and binding on all persons.

Sec. 11.06 Fiduciary Standards. Each fiduciary shall discharge her/his duties with respect to the Regular Pension Plan, solely in the interests of Members, and in accordance with the following requirements:

(a) For the exclusive purpose of providing benefits to Members and defraying

reasonable expenses of administering the Regular Pension Plan,

(b) With the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims,

(c) By diversifying the investments of the Regular Pension Plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so, and

(d) In accordance with the provisions of this Regular Pension Plan and the Regular Pension Trust.

Nothing herein shall be construed or applied to restrict or prohibit the fiduciaries from administering any Investment Fund, including any ELCA South Africa Free Fund and any ELCA Social Purpose Fund, in accordance with the investment objectives and policies from time to time established for such Investment Funds, and the fiduciaries shall not be liable to any Member or other person solely by reason of their adherence to such investment objectives and policies.

Sec. 11.07 No Other Benefits. No benefits other than those specifically provided for herein are to be provided under the Regular Pension Plan.

Sec. 11.08 Source of Benefits. All benefits to which a person becomes entitled hereunder shall be provided only out of the appropriate Fund(s) and only to the extent that such Fund(s) is/are adequate therefor.

Sec. 11.09 Limitation of Liability. The ELCA Board of Pensions shall not be liable to any Member for the failure of any Participating Employer to sponsor an individual as a Sponsored Member in accordance with the policies and practices of such Participating Employer, or in accordance with any contract between the Eligible Employee and the Eligible Employer, or in accordance with Section 3.03(a), whether or not the ELCA Board of Pensions or any representative of any part of the ELCA has actual knowledge of such failure to enroll. The sole remedy of the ELCA Board of Pensions is to involuntarily terminate the status of the entity as a Participating Employer pursuant to Sec. 2.04(b). Furthermore, the ELCA Board of Pensions shall not be liable to any Member for any claim based on its failure to involuntarily discontinue such entity's status as a Participating Employer, whether or not the ELCA Board of Pensions or any other part of the ELCA had actual knowledge of the facts that would justify the involuntary termination of the entity's status as a Participating Employer.

Trust Document

ELCA Regular Pension Trust

BOARD OF PENSIONS
Evangelical Lutheran Church in America
800 Marquette Ave., Suite 1050 • Minneapolis, MN 55402 • (612) 333-7651

January 1, 1993

ARTICLE VII: MISCELLANEOUS

Sec. 7.01 Benefits May Not Be Assigned or Alienated. Except as otherwise expressly permitted by the Regular Pension Plan, or required by law, the interests of participants and their beneficiaries under the Regular Pension Plan or this Agreement may not in any manner whatsoever be assigned or alienated, whether voluntarily or involuntarily, directly or indirectly.

Sec. 7.02 Incompetent Payee. If in the opinion of the ELCA Board of Pensions a person to whom the Regular Pension Trustees are directed to make one or more payments is disabled from caring for her/his affairs because of mental or physical condition, payment due such person may be made to such person's guardian, conservator, or other legal personal representative upon furnishing the ELCA Board of Pensions with evidence satisfactory to the ELCA Board of Pensions of such status. Prior to the furnishing of such evidence, the ELCA Board of Pensions may cause payments for the person under disability to be made, for such person's use and benefit, to any person or institution then in the opinion of the ELCA Board of Pensions caring for or maintaining the person who is under the disability. The Regular Pension Trustees shall have no liability with respect to payments made to an individual designated by the ELCA Board of Pensions. The Regular Pension Trustees shall have no duty to make inquiry as to the competence of any person to whom it is directed to make payment.

Sec. 7.03 Evidence. Evidence required of anyone under this Agreement may be by certificate, affidavit, document, or other instrument which the person acting in reliance thereon considers to be pertinent and reliable, and to be signed, made, or presented by the proper party.

Sec. 7.04 Dealings of Others With Regular Pension Trustees. No person (corporate or individual) dealing with the Regular Pension Trustees shall be required to see to the application of any money paid or property delivered to the Regular Pension Trustees or to determine whether the Regular Pension Trustees are acting pursuant to any authority granted to them under this Agreement.

Sec. 7.05 Fiduciary Standards. Each fiduciary shall discharge her/his duties with respect to the Regular Pension Trust, solely in the interests of the Members and in accordance with the following requirements:

(a) For the exclusive purpose of providing benefits to participants in the Regular Pension Plan and their beneficiaries and defraying reasonable expenses of administering the Regular Pension Trust,

(b) With the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in

the conduct of an enterprise of a like character and with like aims,

(c) By diversifying the investments of the Regular Pension Trust so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so, and

(d) In accordance with the provisions of this Regular Pension Trust and the Regular Pension Plan.

Nothing herein shall be construed or applied to restrict or prohibit the fiduciaries from administering any Investment Fund, including any ELCA South Africa Free Fund and any ELCA Social Purpose Fund, in accordance with the investment objectives and policies from time to time established for such Investment Fund, and the fiduciaries shall not be liable to any Member or other person solely by reason of their adherence to such investment objectives and policies.

Sec. 7.06 Expenses of the ELCA Board of Pensions. The ELCA Board of Pensions shall be reimbursed from the Regular Pension Trust for all reasonable costs of administering the Regular Pension Plan, incurred by the ELCA Board of Pensions, including costs associated with informing the employees and employers of the availability of the Regular Pension Plan. Such reimbursements shall be paid from the Regular Pension Trust in such proportions as the ELCA

Board of Pensions shall determine and shall constitute a lien upon the Regular Pension Trust until paid.

Sec. 7.07 Audits. The ELCA Board of Pensions shall have the right to cause the books, records, and accounts of the Regular Pension Trustees that relate to the Regular Pension Plan to be examined and audited by independent auditors designated by the ELCA Board of Pensions at such times as the ELCA Board of Pensions may determine, and the Regular Pension Trustees shall make such books, records, and accounts available for such purposes at all reasonable times. The expense of such audit shall be paid from the Regular Pension Trust, if not paid by the Participating Employers in such proportion as the ELCA Board of Pensions shall determine, and shall constitute a lien upon the Regular Pension Trust until paid.

Sec. 7.08 Successors. The provisions of this Agreement shall be binding on each Participating Employer and its successors. If a successor to a Participating Employer or a purchaser of all or substantially all of a Participating Employer's assets is eligible to, and elects to, continue the Regular Pension Plan, such successor or purchaser shall be substituted for the Participating Employer under this Agreement.

Sec. 7.09 Waiver of Notice. Any notice required under this Agreement may be waived by the person entitled thereto.

Sec. 7.10 Headings. Headings at the beginning of articles and sections are for convenience of reference, shall not be considered a part of this Agreement, and shall not influence its construction.

Sec. 7.11 Use of Compounds of Word "Here". Use of the words "hereof", "herein", "hereunder", or similar compounds of the word "here" shall mean and refer to the entire Agreement unless the context clearly indicates otherwise.

Sec. 7.12 Construed as a Whole. The provisions of this Agreement shall be construed as a whole in such manner as to carry out the provisions thereof and shall not be construed separately without relation to the context.

Sec. 7.13 Counterparts. This Agreement may be executed in any number of counterparts, each of which shall be deemed an original. Such counterparts shall constitute but one and the same instrument, which may be sufficiently evidenced by any one counterpart.

Sec. 7.14 Indemnification of Regular Pension Trustees. The Participating Employers jointly and severally agree to indemnify each of the Regular Pension Trustees for and to hold each harmless against any and all liabilities, losses, costs, or expenses (including legal fees and expenses) of whatsoever kind and nature which may be imposed on, incurred by, or asserted

1992 Summary Plan Description

ELCA Regular Pension Plan

Including Investment Options

BOARD OF PENSIONS
Evangelical Lutheran Church in America

EXHIBIT C

ABOUT THIS BOOKLET

Introduction

The Board of Pensions of the Evangelical Lutheran Church in America administers the ELCA Pension and Other Benefits Program which provides pensions and benefits for Ordained Ministers, Associates in Ministry and Lay Employees of the ELCA under ALL of the following Plans:

- Regular Pension Plan*
- Medical and Dental Benefits Plan
- Disability Benefits Plan
- Survivor Benefits Plan

** The ELCA Optional Pension Plan (not described in this booklet) is also available to Members who participate in the Regular Pension Plan.*

These Plans provide a continuity of benefits for Plan Members as they serve various congregations and/or church-related organizations throughout their church career.

This Summary Plan Description provides information on the Regular Pension Plan, including the nine investment options.

Defined Contribution Plan

The Regular Pension Plan is a "defined-contribution" plan. Under this Plan a fixed percentage of the Member's salary is contributed to the Member's Account.

Regular Pension Plan contributions may come from: "Required Contributions" and "Additional Contributions." The "Required Contribution" is determined as a percent of the Member's "defined compensation." Employers must contribute "Required Contributions" for everyone enrolled in

the Regular Pension Plan. Employers may also make extra contributions known as "Additional Contributions." Tax laws limit the amount of "Additional Contributions" that the employer may contribute for a Member's benefit. The Board will calculate that limit upon request.

Contributions are credited to separate Accounts in the Regular Pension Plan depending on the Member's election within the nine investment options. The investment funds are managed on behalf of Plan Members, based on long-term investment goals.

This Plan is an Important Part of a Member's Financial Security

The primary purpose of the Regular Pension Plan is to provide Plan Members and their beneficiaries with retirement income. The employer contributions to the Member's Account under this Plan are an important part of financial security in retirement Additionally, Social Security, personal savings, home ownership and contributions made to the Optional Pension Plan also contribute to a Plan Member's financial security at retirement.

At retirement, the Member's total Account, that is, all contributions plus investment earnings, form the basis for calculating the retirement pension (monthly annuity).

Members are encouraged to read this booklet carefully.

This Booklet is a Summary of the ELCA Regular Pension Plan

This Summary Plan Description summarizes the Regular Pension Plan and investment options, effective January 1, 1992. As a summary, it cannot deal with every conceivable set of circumstances. In all cases, the Member's rights under the Regular Pension Plan are governed by the Plan's legal

document. If, in a set of circumstances, this summary is inconsistent with the Plan document, the legal document will control.

A copy of the legal document for this Plan may be obtained from the Interpretation Department of the Board of Pensions.

FIDUCIARY STANDARDS

Prudent Investor Rule

The board of directors or trustees administering or investing pension assets are bound by the "prudent investor" rule. This common law concept has evolved through the years and is set forth in the American Law Institute's **Restatement of the Law of Trusts, Third,** section 227, which states in part that:

Sec. 227 General Standard of Prudent Investment

The trustee is under a duty to the beneficiaries to invest and manage the funds of the trust as a prudent investor would, in light of the purposes, terms, distribution requirements and other circumstances of the trust.

(a) This standard requires the exercise of reasonable care, skill and caution, and is to be applied to investments not in isolation but in the context of the trust portfolio and as a part of an overall investment strategy, which should incorporate risk and return objectives reasonably suitable to the trust.

(b) In making and implementing investment decisions, the trustee has a duty to diversify the investments of the trust unless, under the circumstances, it is prudent not to do so.

Many states, including Minnesota, have incorporated the prudent investor rule in their statutes. The ELCA Board of Pensions, a Minnesota nonprofit corporation, is governed by Minnesota Statutes, § 501B.10, which sets out the statutory requirements governing trust investments and states in part as follows:

Sec. 501B.10 Kinds of Property a Trustee may Acquire.
Subd.1. General Properties and Investments.

(a) A trustee may invest in every kind of real or personal property and every kind of investment that a prudent person would invest in having in mind the preservation of the trust estate and the amount and integrity of the income derived. This permission includes, but is not limited to, bonds, debentures, and other individual or corporate obligations, mutual funds, and corporate stocks. In considering an investment, a trustee shall exercise the care, skill and judgment under the circumstances then prevailing that a person of ordinary prudence would exercise in the management of the person's own property and shall consider the role that the investment plays within the trust's overall portfolio of assets.

1974 ERISA Standards

While the so-called Church "exemption" removes church pension trusts from the requirements of the Employee Retirement Income Security Act (ERISA), there can be little doubt that any judge, whether state or federal, in analyzing the propriety of Board actions, would look to the standards established in ERISA. In 1974 Congress, in enacting ERISA, codified the prudent person rule by enacting the so-called "sole interest" and "exclusive purpose" rules. 29 United States Code Sec. 1104(a)(1) defines the prudent person standard of care as follows:

Sec. 1104. Fiduciary Duties

*(a) **Prudent Man Standard of Care.** (1) Subject to sections 1103(c) and (d) [ERISA Sec. 403(c) and (d)], 1342 [ERISA Sec. 4042], and 1344 [ERISA Sec. 4044], of this title, a fiduciary shall discharge his duties with respect to*

a plan solely in the interest of the participants and beneficiaries and-

(A) for the exclusive purpose of:
  (i) providing benefits to participants and their beneficiaries; and
  (ii) defraying reasonable expenses of administering the plan;
(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;
(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and
(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter or subchapter III of this chapter.

1982 TEFRA Standards

Code Sec. 403 (B)(9) which enables the ELCA to form a 403(b)(9) "church Plan." was enacted as part of the Tax Equity and Fiscal Responsibility Act of 1982. The Conference Report imposes the exclusive benefit and nondiversion rules as follows:

The conferees also intend that the assets of a church plan . . . cannot be used for or diverted to purposes other than for the exclusive benefit of employees and their beneficiaries. Of course, the reasonable costs of administering a retirement income account . . . may be charged against the account. Such costs include the reasonable costs of administering a retirement income program of which the account is a part,

including costs associated with informing employees and employers of the availability of the program.

1993
Brief Summary

ELCA Pension and
Other Benefits Program

BOARD OF PENSIONS
Evangelical Lutheran Church in America

EXHIBIT D

Regular Pension Plan

New Plan Provision–1993

- **The minimum Required Pension Contribution (9.0 percent previously) will be increased to 9.5 percent.**

The Regular Pension Plan is designed to provide you with a monthly retirement income. The congregation or organization you serve contributes a percentage of your "monthly defined compensation" toward the Plan. The amount contributed is credited to your personal Account and is immediately vested (belongs to you). You receive quarterly statements of the balance in your Account and annual projections of your retirement income.

Contributions are tax-deferred
All contributions made on your behalf to the Regular Pension Plan are "before-tax." In other words, federal income tax is not paid on these contributions at the time they are made. Taxes are deferred until benefits are paid to you.

Earnings and Account Valuations
Bond and Balanced Fund investments are credited with investment earnings each year. Equity Fund investments are adjusted to the market value of the underlying securities each month. There is, however, a one- to two-month delay in this valuation.

Withdrawal provisions
The Regular Pension Plan is designed to provide you and your spouse with a lifetime income. Your Basic Pension Account (employer contributions) can be converted only to monthly payments. Withdrawals are not permitted, except when there

is a Separation from Service and your Account balance is less than $5400. A lump sum withdrawal can also be made at retirement if your monthly pension is calculated at less than $40. Member contributions made to predecessor church pension plans have different rules.

Death benefits before retirement
If you die before pension payments begin, your spouse immediately receives a lifetime monthly pension based on the balance of your pension Account. If you have no spouse upon death, part or all of your Account will be used to provide a pension for surviving children under age 21. Any remainder of your Account will be paid to your designated beneficiary or to your estate. Additional benefits may also be payable from the Survivor Benefits Plan.

Benefits for divorced spouse
A portion of a pension Account may be assigned by a court to a divorced spouse. A brochure entitled *When There is Divorce* is available upon request from the Board of Pensions.

How benefits are calculated
Monthly pension benefits under this Plan are based on:

- The amount of **contributions** credited to your Account upon retirement;
- The amount of **investment earnings** credited to your Account upon retirement;
- The **form of payment** you select; and
- **Your age** (and your spouse's age, if applicable) when you begin receiving payments.

You may begin receiving pension payments upon retirement as early as age 60 or after 30 years of service. However, payments must begin no later than age 70 1/2, even if you are

still employed. You may choose from the following forms of payment:

- Single Life Pension (with spouse's consent);
- Joint Pension, with 60 percent to your surviving spouse (with spouse's consent);
- Joint Pension, with 75 percent to either you or your spouse, as survivor; or
- Joint Pension, with 100 percent to either survivor.

Summary of Investment Funds

The Regular Pension Plan offers nine investment choices for your Basic Pension Account. Before making your decision, however, you should read the booklet entitled *Summary Plan Description–Regular Pension Plan including Investment Options* available from the Board of Pensions.

Evangelical Lutheran Church in America

CONSTITUTIONS, BYLAWS, AND CONTINUING RESOLUTIONS

as adopted by the Constituting Convention
of the Evangelical Lutheran Church in America
(April 30, 1987)

and

as amended by the
First (1989), Second (1991), and Third (1993)
Churchwide Assemblies
of the Evangelical Lutheran Church in America

Edition current as of September 1993

Chapter 12.
CHURCHWIDE ASSEMBLY

12.10. Description and Authority of the Churchwide Assembly

12.11. The Churchwide Assembly shall be the highest legislative authority of the churchwide organization and shall deal with all matters which are necessary in pursuit of the purposes and functions of this church. The powers of the Churchwide Assembly are limited only by the provisions of the Articles of Incorporation, this constitution and bylaws, and the assembly's own resolutions.

12.20. Duties of the Churchwide Assembly

12.21. The Churchwide Assembly shall:

a. Review the work of the churchwide officers, and for this purpose require and receive reports from them and act on business proposed by them.
b. Review the work of the churchwide units, and for this purpose require and receive reports from them and act on business proposed by them.
c. Receive and consider proposals from synod assemblies.
d. Establish churchwide policy.
e. Adopt a budget for the churchwide organization.
f. Elect officers, board members, and other persons as provided in the constitution or bylaws.
g. Establish churchwide units to carry out the functions of the churchwide organization.

h. Have the sole authority to amend the constitution and bylaws.
i. Fulfill other functions as required in the constitution and bylaws.
j. Conduct such other business as necessary to further the purposes and functions of the churchwide organization.

12.30. Meetings of the Churchwide Assembly

12.31. The assembly shall meet biennially in regular session. Special meetings may be called by a two-thirds vote of the Church Council. The purpose for a special meeting shall be stated in the notice.

12.31.01. The time and place of the Churchwide Assembly shall be determined by the Church Council. The time and place for the next regular assembly normally shall be announced at the preceding assembly.

12.31.02. The secretary shall give notice of the time and place of each regular assembly by publication thereof at least 60 days in advance in this church's periodical. The secretary shall give written notice of a special assembly to the bishop of each synod upon the issuance of a call thereof and shall publish the same in this church's periodical at least 30 days in advance of the special assembly. Written notice shall be mailed to all voting members not more than 30 days nor less than 10 days in advance of any meeting.

12.31.03. At least 20 days prior to an assembly the secretary shall prepare and distribute to each congregation and to the voting members-elect a preassembly report.

12.31.04. The arrangements for agenda, program, and worship shall be under the supervision of the bishop.

12.31.05. Physical arrangements for churchwide assemblies shall be made by the secretary or by an assembly manager working under the secretary's supervision. Such committees as may be necessary to facilitate the planning for and operation of the assembly may be established by the secretary in consultation with the bishop.

12.31.06. The churchwide organization shall be responsible for the costs of the Churchwide Assembly, including reasonable costs for travel, housing, and board for voting and advisory members.

12.31.07. At least one-half of all persons elected as voting members must be present at a meeting to constitute a quorum for the legal conduct of business. If such a quorum is not present, those voting members present may adjourn the meeting to another time and place, provided that only those persons eligible to vote at the original meeting may vote at the adjourned meeting.

12.31.08. Proxy and absentee voting shall not be permitted at a Churchwide Assembly.

12.31.09. The Churchwide Assembly shall use parliamentary procedures in accordance with Robert's Rules of Order, latest edition, unless otherwise ordered by the assembly.

12.40. Members of the Churchwide Assembly

12.41. The voting members of the Churchwide Assembly shall be the voting members of this church. The requirements for voting members of the assembly and other members shall be specified in the bylaws.

12.41.10. Voting Members

12.41.11. Each synod shall elect one voting member of the Churchwide Assembly for every 6,500 baptized members in the synod. In addition, each synod shall elect one voting member for every 50 congregations in the synod. The synod bishop, who is ex officio a member of the Churchwide Assembly, shall be included in the number of voting members so determined. There shall be at least two voting members from each synod. The secretary shall notify each synod of the number of assembly members it is to elect.

12.41.12. The secretary of each synod shall submit to the secretary of this church at least four months before the assembly a certified list of the regular and alternate voting members elected by the synod.

12.41.13. Each voting member of the Churchwide Assembly shall be a voting member of a congregation of this church and shall cease to be a member of the assembly if no longer a voting member of a congregation of this church. The criterion for voting membership in the congregation from which the voting member is elected shall be in effect regarding minimum age for that voting member.

12.41.14. Voting members elected through the process of 12.41.11 through 12.41.13. shall begin serving with the opening of a regular Churchwide Assembly and shall continue serving until voting members are seated at the next regular Churchwide Assembly.

12.41.15. Except as defined in 12.41.21., employees of the churchwide organization, including those serving

under call, appointment, employment agreement, or contract, shall not be eligible for election and service as voting members of the Churchwide Assembly

12.41.20. Ex Officio Members

12.41.21. The officers of this church and the bishops of the synods shall serve as ex officio members of the Churchwide Assembly. They shall have voice and vote.

12.41.30. Advisory Members

12.4131. Members of the Church Council and board chairpersons or their designees, unless elected as voting members, shall serve as advisory members of the Churchwide Assembly Executive directors of churchwide units, the executive for administration, and executive assistants to the bishop shall serve as advisory members of the Churchwide Assembly.

12.4132. Advisory members shall have voice but no vote.

12.41.40. Other Non-Voting Members

12.41.41. Other categories of non-voting members may be established by the Churchwide Assembly.

12.41.A89. *Presidents of the colleges, universities, and seminaries of this church, unless elected as voting members of the assembly, shall have voice but not vote.*

12.50. Committees of the Churchwide Assembly

12.51. The Churchwide Assembly shall have a Reference and Counsel Committee, a Memorials Committee, and a Nominating Committee. The description of these committees shall be in the

bylaws. The Churchwide Assembly may authorize such other committees as it deems necessary.

12.51.10. Reference and Counsel Committee

12.51.11. A Reference and Counsel Committee, appointed by the Church Council, shall review all proposed changes or additions to the constitution and bylaws and other items submitted that are not germane to items contained in the stated agenda of the assembly.

12.51.20. Memorials Committee

12.51.21. A Memorials Committee, appointed by the Church Council, shall review memorials from synodical assemblies and make appropriate recommendations for assembly action.

12.51.30. Nominating Committee

12.51.31. A Nominating Committee, elected by the Churchwide Assembly, shall nominate two persons for each position for which an election will be held by the Churchwide Assembly and for which a nominating procedure has not otherwise been designated in the constitution and bylaws of this church.

Supreme Court, U.S.
FILED
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CLERK

(2)

No. 95-1796

In The
Supreme Court of the United States

October Term, 1995

THE REVEREND THOMAS L. BASICH, et. al.,
Petitioners,

v.

BOARD OF PENSIONS, EVANGELICAL LUTHERAN CHURCH IN AMERICA (ELCA), a Minnesota non-profit corporation; EVANGELICAL LUTHERAN CHURCH IN AMERICA (ELCA), a Minnesota non-profit corporation,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE MINNESOTA COURT OF APPEALS

BRIEF IN OPPOSITION

John D. French
Counsel of Record
Bonnie M. Fleming
Thomas H. Bennin
FAEGRE & BENSON LLP
2200 Norwest Center
90 South Seventh Street
Minneapolis, MN 55402
(612) 336-3000

Attorneys for Respondent
Board of Pensions of the Evangelical
Lutheran Church in America

66 pp

QUESTIONS PRESENTED

The second question presented by Petitioners was neither pressed before the Minnesota Court of Appeals nor in Petitioners' petition for review to the Minnesota Supreme Court, nor was it passed upon below. Thus, it is not an appropriate subject for exercise of this Court's jurisdiction on a petition for writ of certiorari. 12 U.S.C. § 1257. Petitioners' questions do not disclose that the decision below was based, in part, on independent and adequate state grounds not reviewable by this Court by writ of certiorari. (*See infra* at 14-15). The two questions which would be before this Court if certiorari were granted are:

1. Whether the Freedom of Conscience Clause of the Minnesota Constitution precludes Minnesota courts from exercising jurisdiction over a claim alleging that the Evangelical Lutheran Church in America ("ELCA") and the Board of Pensions of the ELCA ("Board of Pensions") breached contractual and fiduciary obligations to "church pension plan" participants when the Board of Pensions adopted a policy to guide investments based on established religious doctrine and church policy.

2. Whether the First Amendment to the federal Constitution precludes Minnesota courts from exercising jurisdiction over a claim alleging that the ELCA and the Board of Pensions breached contractual and fiduciary obligations to "church pension plan" participants when the Board of Pensions adopted a policy to guide investments based on established religious doctrine and church policy.

RULE 29.6 STATEMENT

The Board of Pensions is a Minnesota non-profit religious corporation which issues no stock. It is a Churchwide Unit of the ELCA, a separately incorporated Minnesota non-profit religious corporation, which issues no stock.

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STATEMENT OF JURISDICTION

Contrary to Petitioners' statement of jurisdiction, 28 U.S.C. § 1257 does not confer certiorari jurisdiction upon this Court because the second question presented by Petitioners was neither pressed nor passed upon below and thus does not constitute a final judgment or decree rendered by the highest court of a State. In addition, the Minnesota Court of Appeals' decision rests on independent and adequate state grounds not reviewable by this Court. (*See infra* at 14-15).

CONSTITUTIONAL PROVISIONS INVOLVED

The Freedom of Conscience Clause, Section 16, Article I of the Constitution of the State of Minnesota provides:

> The enumeration of rights in this constitution shall not be construed to deny or impair others retained by and inherent in the people. The right of every man to worship God according to the dictates of his own conscience shall never be infringed, nor shall any man be compelled to attend, erect or support any place of worship, or to maintain any religious or ecclesiastical ministry, against his consent; nor shall any control of or interference with the rights of conscience be permitted, or any preference be given by law to any religious establishment or mode of worship; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of the State, nor shall any money be drawn from the treasury for the benefit of any religious societies, or religious or theological seminaries.

The First Amendment of the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

The action below arises out of a disagreement between the Petitioners and their church over which religious doctrines and church policies could properly provide a foundation for the guidance of pension fund investments. The Petitioners take the position that while "the ELCA could properly prohibit investments in morally obnoxious commercial activity such as prostitution and pornography," (App. at A-8),[1] the Board of Pensions could **not** properly adopt a policy designed to combat what the ELCA termed the "sin" of apartheid. The Minnesota Court of Appeals held that the Freedom of Conscience Clause of the Minnesota Constitution, and the First Amendment to the United States Constitution, barred the Minnesota courts from exercising jurisdiction over Petitioners' claims because the policy at issue was based on established religious doctrine and church policy. (App. at A-1-11).

[1] Citations to Appendix of Respondent Board of Pensions are designated "(App. at ___)." Although the decision of the Minnesota Court of Appeals is set forth in the Petitioners' Appendix, it is also reproduced in the Board of Pensions' Appendix for the convenience of the Court.

In 1987, at the Constituting Convention of the ELCA, The American Lutheran Church ("ALC"), the Lutheran Church in America ("LCA"), and the Association of Evangelical Lutheran Churches ("AELC"), agreed to merge and form the ELCA. *See* Evangelical Lutheran Church in America Constitutions, Bylaws, and Continuing Resolutions ("ELCA Constitution"), Preamble (App. at B-3).

> The basic commitments of the . . . [ELCA] as well as its organizational outline, structural patterns, and rubrics of governance are reflected by this church's constitutions, bylaws, and continuing resolutions.

Id., Introduction (App. at B-2). The ELCA Constitution was adopted by the Constituting Convention. *Id.*, Preamble (App. at B-3).

The ELCA Constitution contains the following provision:

> This church shall seek to function as people of God through congregations, synods, and the churchwide organization, all of which shall be interdependent. Each part, while fully the church, recognizes that it is not the whole church and therefore lives in a partnership relationship with the others.

Id., § 8.11 (App. at B-4-5).

The ELCA is composed of 65 Synods governing over 11,000 congregations. (App. at BOP-714).[2] The voting members of 65 Synod Assemblies, on a representative basis, elect the members of the Churchwide Assembly. The Churchwide Assembly is the highest legislative authority in the

[2] Citations to the Board of Pensions' Appendix filed with the Minnesota Court of Appeals are designated "(App. at BOP-___)."

ELCA and it meets every two years. *Id.*, §§ 12.11, 12.31, 12.41.11 (App. at B-5) (App. at BOP-370, 371). The Churchwide Assembly elects the Bishop of the ELCA, who also serves as President and Chief Executive Officer of the ELCA, the Vice President and Secretary of the ELCA, and the 33 members of the Church Council. *Id.*, §§ 13.21, 13.22a, 13.32, 13.42 & 14.31 (App. at BOP-374-76, 380). The Church Council is the interim legislative authority for the ELCA between meetings of the Churchwide Assembly. *Id.*, § 4.11 (App. at B-5).

The Board of Pensions of the ELCA ("Board of Pensions") was also created in 1987 at the Constituting Convention. The Board of Pensions is a separately incorporated Churchwide Unit established to provide church pension and other benefits plans for the benefit of eligible workers employed within the structure of the ELCA. Participation in the various plans is limited to qualifying employers, including congregations, and participation is entirely voluntary. *Id.*, §§ 17.12, 17.61 & 17.61.A91.d (App. at B-6, 8). As a part of the ELCA churchwide organization, the Board of Pensions is established to "carry out God's mission through this church." *Id.*, § 4.03(a) (App. at B-4).

The Churchwide Assembly elects the 21 members of the Board of Trustees of the Board of Pensions. *Id.*, § 17.61.03 (App. at BOP-421). The Churchwide Assembly is also responsible for creating the governance structure for the Board of Pensions and approves the documents establishing and governing the Board and its program. *Id.*, § 17.61.01 (App. at B-7).

The ELCA Constitution recognizes that the Board of Pensions is not only part of the church in a partnership relationship with the other parts of the churchwide organization, the synods and the congregations, but also recognizes that it has the responsibility to use its best judgment in the investment of the assets of the pension plan and to comply with its fiduciary responsibilities. *Id.*, § 8.11

(App. at B-4-5). The specific responsibilities of the Board of Pensions are set out in the Continuing Resolutions of the ELCA Constitution. *Id.*, § 17.61.07 (App. at B-7).

Continuing Resolutions 17.61.A91.a and 17.61.A91.b of the ELCA Constitution provide as follows:

> a. This board shall manage and operate the pension and other benefits plans for this church with the design and policy adopted by the Churchwide Assembly and shall invest the assets according to its best judgment.
>
> b. The Investment Committee of the Board of Pensions shall receive advice and counsel from the Advisory Committee on the Church's Corporate Social Responsibility formed by the Division for Church in Society and within the context of fiduciary responsibility make appropriate recommendations to the board.

(App. at B-7-8). Thus, under its constituting authority, the Board of Pensions has a dual responsibility, to make investment decisions within the context of its best judgment and its fiduciary responsibilities as well as to make such decisions within the design and policy adopted by the Churchwide Assembly.

All of the pension investments managed by the Board are managed under the pertinent provisions of the ELCA Constitution (App. at BOP-300-502), the Board's Articles of Incorporation and Bylaws, (App. at BOP-32-33, 43-44) the Regular Pension Trust (App. at BOP-503-41) and Regular Pension Plan (App. at BOP-542-604).[3] Consistent with the

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[3] Contrary to petitioners statements (Petition at 7), the Board of Pensions holds the assets of the pension plan in trust for the benefit of the pension plan participants. The Board of Pensions has a trust rela-

ELCA Constitution, the Board's Articles of Incorporation and Bylaws provide that:

> This corporation is organized and shall be operated exclusively for religious purposes and exclusively for the benefit of and to assist in carrying out the purposes of the Evangelical Lutheran Church in America (the "ELCA"), a Minnesota non-profit corporation. In furtherance of these purposes this corporation shall manage and operate the worker benefits plans for the ELCA and its institutions within the design and policy adopted from time to time by the Churchwide Assembly or Church Council of the ELCA.

(App. at C-2). Likewise, the Regular Pension Trust is formed

> exclusively for religious and charitable purposes and in connection therewith exclusively for the benefit of, and to assist in carrying out the purposes of, the Evangelical Lutheran Church in America.

(App. at D-2).

This dispute represents the culmination of a theological debate within the Lutheran community, dating back to the early 1970s, regarding how to express the Lutheran churches' opposition to apartheid. (App. at BOP-944-60, 971-80). In 1977, the Lutheran World Federation, the community of the worldwide Lutheran family, met in assembly in Dar es Salaam, Tanzania, and declared that apartheid was

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tionship with the pension plan participants, not a contractual relationship.

> so oppressive and so contrary to the Lutheran understanding of the unity of believers in Christ and the equality of the entire human family that it must be rejected as a matter of the faith itself.

(App. at E-2).

The delegates to the 1977 Lutheran World Federation Assembly declared opposition to apartheid to be a matter of "*status confessionis*," that is, a fundamental confession of the faith of the Lutheran church. (App. at E-2).

> [A]partheid is viewed by us as simply and starkly in conflict with the biblical faith we hold. It is not a political ideology with which believers may compromise, but must be opposed by whatever means are at hand.

(App. at E-3).

At the 1987 Constituting Convention of the ELCA, the delegates passed Resolution 87.2.50, which provided:

> **Resolved, that we, the delegates of the Constituting Convention of the ELCA, express our unqualified opposition to the apartheid system in South Africa, and the illegal occupation and oppression by South Africa of Namibia; and be it further**
>
> **Resolved, that we pledge to you that we will work tirelessly to see that none of our ELCA Pension Funds will be invested in companies doing business in South Africa** . . . .

(App. at F-3) (emphasis in original). Resolution 87.2.50 was the directive the Board of Pensions of the ELCA received from the Constituting Convention at its inception.

At its June 1988 meeting, the Board of Pensions responded to Resolution 87.2.50 by adopting the following policy:

> ELCA Board of Pensions Policy Statement
>
> As part of the Evangelical Lutheran Church in America, the Board of Pensions continues to be sympathetic to the plight of the oppressed people of South Africa/Namibia. . . . The Board of Pensions has declared its desire fully to reflect the action of the Constituting Convention with respect to divestment for all investments to the extent permitted by the Board's fiduciary responsibilities.
>
> . . .
>
> First, the Board of Pensions has directed that, whenever the conditions of risk and return are equal in the choice among stocks and bonds held by the Board on behalf of Plan members, or available for purchase, the holdings in companies with South Africa investments will be divested, and similarly, investments in these companies will not be made.

(App. at G-1-2). The language of the Board's 1988 Policy Statement concerning investment decisions as subsequently amended, is referred to as the "Equivalency Policy."[4]

The Board's 1988 Policy Statement was sent to the Church Council for consideration. In its July 1988 meeting, the Church Council responded by affirming:

[4] Contrary to petitioners claim (Petition at 8), there is no basis for concluding that the application of the Equivalency Policy resulted in any underperformance losses to the pension plan.

> that the Board of Pensions will fully reflect the action of the Constituting Convention that "none of our ELCA Pension Funds . . . be invested in companies doing business with South Africa," within the context of its fiduciary responsibility.

(App. at H-1).

At the 1989 Churchwide Assembly, 44 of the 65 Synods sent memorials to the Churchwide Assembly requesting deliberate and complete divestment of pension fund assets from companies doing business in South Africa (App. at BOP-716, 792).[5] The memorials resulted in an emotionally charged 70 minute floor debate within the highest legislative body of the ELCA that was seen as the climax of the years of struggle over this issue. (App. at BOP-792). The Churchwide Assembly, as the highest legislative authority of the ELCA, determined that the ELCA pension funds were to be completely divested by September 1, 1991.[6] (App. at BOP-739).

[5] Memorials from a Synod Assembly to the Churchwide Assembly are the means by which a Synod Assembly proposes actions to be considered by the Churchwide Assembly. ELCA Constitution § 10.21.c.8 (App. at BOP-361).

[6] The action of the 1989 Churchwide Assembly did not go uncriticized within the Lutheran community. One group that opposed divestment of ELCA pension funds was "Lutherans for Religious and Political Freedom," which publishes a newsletter, "The Lutheran Commentator." A special edition of the Lutheran Commentator on divestment was published following the 1989 Churchwide Assembly. (App. at BOP-795-802). Three of the Plaintiffs, the Reverend Thomas L. Basich, Robert D. Hansen, and David M. Carlson wrote articles or letters which were included in the special edition. All of the articles were critical of the action taken by the 1989 Churchwide Assembly. (App. at BOP-795-802).

After review of the Churchwide Assembly's action, the Board of Pensions stated that immediate and complete divestment would create an exception to the prudent person and exclusive benefit rules as stated in the plan documents and recommended that it not be implemented. (App. at BOP-717). After additional debate and review, the ELCA Church Council determined that the Board of Pensions was to establish investment options that were South Africa Free, continue to apply the Equivalency Policy to the unscreened pension funds and continue to communicate its actions on divestment to the Church Council semi-annually. (App. at BOP-718).

The Equivalency Policy was adopted by the Board of Pensions in response to the actions of the Constituting Convention, the Churchwide Assembly and the Church Council. (App. at BOP-716). It reflects the Board's balancing of its dual responsibility to the Church and its religious purposes and to the Plan members and its fiduciary obligations.

On September 27, 1993, thirty of the Plaintiffs (who were subsequently joined by an additional 19 Plaintiffs), commenced a lawsuit against the ELCA Board of Pensions and the ELCA seeking individual relief on the grounds of breach of contract, declaratory relief and injunctive relief. The district court granted the ELCA and Board's motions to dismiss the second and third counts of the suit for declaratory and injunctive relief,[7] but denied their motions for summary judgment on the contract claim as the court found there were material facts at issue concerning the parties' relationship. On March 6, 1995, the ELCA and the Board of Pensions again

[7] The trial court ruled these claims were moot as the Equivalency Policy was no longer in effect (App. at BOP-15-20). The Board of Pensions eliminated the policy as of November 12, 1993, given the changes then occurring in South Africa. (App. at BOP-917-22, 923).

moved for summary judgment on the grounds that the First Amendment of the United States Constitution and the Freedom of Conscience Clause of the Minnesota Constitution deprived the court of subject matter jurisdiction. The district court denied the motion. The defendants appealed to the Minnesota Court of Appeals which reversed the district court. The Minnesota Supreme Court denied Petitioners' Petition for Review.

SUMMARY OF THE ARGUMENT

Petitioners' Writ of Certiorari should be denied for the following reasons:

First, the second question presented by Petitioners—whether the Minnesota Court of Appeals' application of the Freedom of Conscience Clause of the Minnesota Constitution violates the United States Constitution—was neither pressed nor passed on below. It thus does not constitute a decision by a state court of last resort that is appropriate for review by this Court.[8] S. Ct. R. 10; 28 U.S.C. § 1257(a) (*See infra* at 13-14).

Second, the Minnesota Court of Appeals' judgment rests on adequate and independent state grounds. Respect for the independence of state courts and the avoidance of rendering advisory opinions have been the cornerstones of this Court's refusal to decide cases where there is an adequate and independent state ground for the decision. (*See infra* at 14-15).

[8] Petitioners' second question is raised at this untimely stage of the proceedings merely as a strategic device to mask the existence of adequate and independent state grounds for the decision of the Minnesota Court of Appeals, and presents no serious constitutional questions. (*See infra* at 14-15).

Third, the Minnesota Court of Appeals properly held that the Freedom of Conscience Clause of the Minnesota Constitution precludes a civil trial court from exercising jurisdiction over Petitioners' claim that the ELCA and its Board of Pensions breached contractual and fiduciary obligations to the ELCA's "church pension plan" participants by adopting a policy to guide investments based upon church doctrine and resolutions adopted by the ELCA's Constituting Convention and the Churchwide Assembly, the ELCA's highest legislative body. (*See infra* at 18-20).

Fourth, contrary to Petitioners' arguments, the Minnesota Court of Appeals did not make erroneous factual findings or misapply the Establishment Clause, but properly held that the First Amendment of the United States Constitution precludes a civil trial court from exercising jurisdiction over Petitioners' claim that the ELCA and its Board of Pensions breached contractual and fiduciary obligations to the ELCA's "church pension plan" participants by adopting a policy to guide investments based upon church doctrine and resolutions adopted by the ELCA's Constituting Convention and the Churchwide Assembly, the ELCA's highest legislative body. (*See infra* at 21-24).

Thus, Petitioners present no appropriate or compelling reasons for granting certiorari. The Minnesota Court of Appeals did not decide an important federal question that conflicts with the decision of another state court of last resort or of a United States Court of Appeals, nor did it decide an important issue of federal law that has not been, but should be, settled by this Court, or that conflicts with relevant decisions of this Court.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

Petitioners' Second Question Was Neither Pressed Nor Passed On Below, Thus Providing No Jurisdictional Basis for Granting the Petition for Writ of Certiorari

Petitioners acknowledge that the question of whether the application of the Minnesota Constitution's Freedom of Conscience Clause violates the federal Constitution was neither pressed nor passed upon below. (Petition at 9). Thus, a grant of certiorari with respect to this question would be inappropriate.

Whether construed to be a principle of jurisdiction or prudence (Petition at 10), the rule against considering questions neither pressed nor passed on below is fundamental. The rule is founded on "reasons of peculiar force" based on "due regard for the appropriate relationship of this Court to state courts." *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434 (1940). The rule pervades this Court's statutory jurisdiction,[9] requirements governing the contents of a petition for writ of certiorari,[10] and considera-

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[9] 28 U.S.C. § 1257(a) provides in part: "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari . . . ."

[10] The requirements for a petition for writ of certiorari include a statement of the case setting out "the stage of the proceedings, both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were raised" and "the method or manner of raising them and the way in which they were passed on by those courts." S. Ct. R. 14(1)(g)(i).

tions governing review on certiorari.[11] "[T]his Court . . . consistently refuses to consider any grounds of attack not raised or decided in [state] court." *Id.* at 434-35.

The Petitioners offer no justification for presenting a novel question at this stage of the proceedings. The question posed does not concern a core issue such as the "vitality of civil and political institutions in our society." *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949). The question cannot be characterized as "plain error" on the record. *Vachon v. New Hampshire*, 414 U.S. 478, 479 & n.1 (1974). Simply put, the Petition for Writ of Certiorari pending before this Court offers no compelling reason why it should be one of a mere handful of exceptions made to the rule over the past 170 years. *See Illinois v. Gates*, 462 U.S. 213, 219 (1983).

The Decision Below Rests On Independent And Adequate State Grounds And Thus Is Inappropriate for Review

As this Court has stated:

> Respect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide cases where there is an adequate and independent state ground.

Michigan v. Long, 463 U.S. 1032, 1040 (1983).

Indicia of the independence and adequacy of the decision below are clear on the face of the Court of Appeals' decision.

[11] Considerations governing review of cases coming from state court all assume that the state court has "decided" a federal question. S. Ct. R. 10.

The Court of Appeals cites, quotes and relies on the Freedom of Conscience Clause of the Minnesota Constitution. (App. at A-9); *see id.* The Court of Appeals distinguishes the effect of the Freedom of Conscience Clause from the federal constitution, noting that the state constitution "affords greater protection for religious liberties." (App. at A-9); *see id.* at 1040-41. The Court of Appeals recites the four factors to be considered to determine whether government action violates the Freedom of Conscience Clause. These factors, though similar to those in the test under *Lemon v. Kurtzman*, 403 U.S. 602 (1971), are not identical. (App. at A-9); *see Long*, 463 U.S. at 1041. The Court of Appeals separately examines each of three factors, relying on Minnesota law, and concludes that government action in this instance would violate the Freedom of Conscience Clause, rendering examination of the fourth factor, least intrusive means, unnecessary. (App. at A-11); *see id.*

> If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision.

Id.

Because the decision below rests on independent and adequate state grounds, it is not properly reviewable by this Court.

Petitioners' Second Question Presents No Substantial Federal Issues

Petitioners' arguments in support of their second question reflect assumptions, or implicate conclusions, that are inimical to fundamental principles of constitutional law. They are unsupported and unsupportable.

Petitioners argue that the application of Minnesota's Freedom of Conscience Clause to the circumstances of this case constitutes a "denial of Petitioners' right of access to the courts" in violation of their federal right to due process. (Petition at 15). Due Process, however, does not guarantee specific results in court. *Barrows v. Jackson*, 346 U.S. 249, 260 (1953). It guarantees only that litigants will be afforded a meaningful opportunity to be "heard" upon claimed rights. Petitioners were afforded an opportunity to be heard by both the district court and the Minnesota Court of Appeals. They were thus afforded all the process due them.

Petitioners further argue that "[n]o compelling interest" supports the purported denial of Petitioners' right of access to the courts to pursue their claims. (Petition at 15). In an almost offhanded manner, Petitioners dismiss Minnesota's interest in enforcing its own constitutional protection of freedom of religion—which the Minnesota Supreme Court has described as "precious" (*see infra* at 18)—arguing that the Freedom of Conscience Clause must yield to virtually any assertion of any purported civil right. Petitioners' Due Process arguments ignore the fundamental proposition that a State may extend greater protection to its citizens than that afforded under the United States Constitution, *Arizona v. Evans*, 514 U.S. ___, 131 L. Ed. 2d 34, 42 (1995), and that Minnesota has expressly done so under its Freedom of Conscience Clause. (*See infra* at 18-20).

Petitioners argue that application of the Freedom of Conscience Clause denies their contractual rights and is an unconstitutional impairment of contract. (Petition at 15). Petitioners' position ignores the fact that any rights Petitioners may have acquired were subject to the provisions of the Minnesota Constitution. *See Wood v. Lovett*, 313 U.S. 362, 370 (1941); *General Motors Corp. v. Romein*, 503 U.S. 181, 189 (1992) (the binding force of an obligation of contract depends on the laws in existence when the contract was made, forming a part of such contract). The application of the Freedom of Conscience Clause cannot constitute a retroactive impairment of Petitioners' claimed contract rights.

Petitioners also argue that application of the Freedom of Conscience Clause violates their right to free speech. (Petition at 18-19). Petitioners rely solely on *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977), for this argument. But Petitioners' argument is inapposite for the simple reason that the Board of Pensions did not contribute any of Petitioners' funds to any social or political cause as was done in *Abood*. *Abood's* holding, that public workers could not be compelled to contribute to political candidates, and that the First Amendment prohibited the union from contributing required membership dues to political candidates, simply does not apply here. *Abood* is further distinguishable because the conduct about which Petitioners complain is part of the fundamental mission of the ELCA and the Board of Pensions, rather than being an action unrelated to the Board's official purpose. *Cf. id.* at 235 (First Amendment barred union from using mandatory dues for the expression of political views unrelated to its duties as bargaining representative for the workers).

Finally, Petitioners argue that the application of the Freedom of Conscience Clause creates "two classes of pension plan participants" in violation of the Equal Protection Clause, those who participate in religious plans, and those who participate in non-religious plans. (Petition at 17-18). On its face, however, the Freedom of Conscience Clause creates no classification except to the extent that every statute, by virtue of the fact that it has an impact on persons falling within its purview and not others, can be said to create a classification. The Freedom of Conscience Clause applies even-handedly to all persons. Because it "neither burdens a fundamental right nor targets a suspect class," it must be upheld under the Fourteenth Amendment as bearing a "rational relation" to a legitimate end; the State's concern with the preservation of religious liberty. *See Romer v. Evans*, ___ U.S. ___, 64 U.S.L.W. 4353, 4356 (1996).

Asserting Civil Jurisdiction Over Petitioners' Claims Would Violate the Freedom of Conscience Clause of the Minnesota Constitution

The Minnesota Court of Appeals correctly held that the Freedom of Conscience Clause of the Minnesota Constitution deprived Minnesota courts of subject matter jurisdiction over this action. (App. at A-11).

As observed by the Minnesota Supreme Court, "[r]eligious liberty is a precious right." *State v. Hershberger*, 462 N.W.2d 393, 398 (Minn. 1990). The *Hershberger* court stressed that the preamble to the Minnesota constitution gives religious liberty coequal status with civil liberty:

> "We, the people of the state of Minnesota, grateful to God for our civil *and religious liberty*, and desiring to perpetuate its blessings and secure the same to ourselves and our posterity, do ordain and establish this Constitution."

Id. at 398 (quoting Minn. Const. preamble) (emphasis in original). The Freedom of Conscience Clause, Article 1, Section 16 of the Minnesota Constitution, bars "any control of or interference with the rights of conscience." Minnesota's Freedom of Conscience Clause provides a "distinctively stronger character of protection" to religious liberties than the First Amendment of the Federal Constitution.[12] *Id.* at 397. In short:

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[12] In *State v. Hershberger*, 444 N.W.2d 282 (Minn. 1989) ("*Hershberger I*"), *vacated*, 495 U.S. 901 (1990), the Minnesota Supreme Court held that the First Amendment to the United States Constitution barred the State of Minnesota from requiring members of the Amish community to display traffic warning signs on their vehicles. This Court granted certiorari, vacated *Hershberger I*, and remanded the case for reconsideration in light of *Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872 (1990). On remand, the Minnesota Supreme Court reached the same conclusion, this time based on the Freedom of Conscience Clause of the Minnesota Constitution. *Hershberger*, 462 N.W.2d at 399.

> Minnesotans are afforded greater protection for religious liberties against governmental action under the state constitution than under the first amendment of the federal constitution.

Id.

Minnesota recognizes that "[i]t is not the province of the court to examine the reason of religious beliefs or to resolve purely religious disputes." *Hill-Murray Federation of Teachers v. Hill-Murray High School*, 487 N.W.2d 857, 865 (Minn. 1992). Contrary to Petitioners' protests, the central issue in this controversy is not *whether* Respondents may properly adopt moral criteria to guide investments, but *what* criteria are adopted. As the Court of Appeals observed, Petitioners take the position that the ELCA could properly prohibit investments by the Board of Pensions "in morally obnoxious commercial activity such as prostitution or pornography." (App. at A-8). Thus, Petitioners do not reject the concept of considering social or moral guidelines for investments, but merely object to investment guidelines which do not meet their personal approval. By their claims, Petitioners ask the courts to invade what is not their province, "to examine the reason of religious belief" and "to resolve purely religious disputes" internal to the ELCA.

To determine whether a challenged government action violates the Freedom of Conscience Clause, Minnesota courts consider (1) whether the objector's belief is sincerely held; (2) whether the action burdens the exercise of religious beliefs; (3) whether the state's interest is compelling; and (4) whether

the state action uses the least restrictive means. *Id.* at 865 The Minnesota Court of Appeals considered these factors and concluded that state action could not be sustained. (App. at A-10-11).

The Minnesota Court of Appeals held that there is "no question that the ELCA acted pursuant to a sincerely held religious belief by enacting the equivalency policy." (App. at A-10). The Minnesota Court of Appeals further held that civil adjudication of Petitioners' claims "would burden the exercise of the ELCA's religious beliefs":

> If the civil courts were allowed to rescind pension plan contracts every time a group of dissenting participants disagreed with the Board of Pensions' social or moral investment strategies, the ELCA's ability to express its faith through social and moral investment would be substantially compromised.

(App. at A-10). Finally, the Court of Appeals held that the government does not have a compelling interest in reviewing this case. (App. at A-11) Expressly rejecting one of Petitioners' central contentions, the Court of Appeals held that the ELCA's internal processes were the appropriate forum to resolve Petitioners' objections to Church policy. (App. at A-11).

Unwilling to accept their Church's judgment, the Petitioners turned to the civil courts. But as the Court of Appeals held: "Judicial inquiry into issues of church doctrine is itself a substantial burden" (App. at A-10), and barred under the Freedom of Conscience Clause.

Asserting Civil Jurisdiction Over Petitioners' Claims Would Violate the First Amendment to the United States Constitution

The Minnesota Court of Appeals correctly held that

> the Establishment Clause of the First Amendment deprives the district court of subject matter jurisdiction in this dispute because review of this issue would require the district court to look beyond neutral principles of contract and trust law and entangle itself in issues of church doctrine.

(App. at A-8).

Petitioners attempt to create the impression that the Minnesota Court of Appeals "misapplied" the Establishment Clause to a civil dispute by describing the issues and holding below in terms carefully cleansed of religious content. Petitioners' approach permits them to assert misleadingly that the holding of this case "affects every person who enters into a contract with a religious organization." (Petition at 14). In fact, the holding of this case is that the First Amendment of the United States Constitution protects judgments about doctrine and governance made by a religious organization, and is squarely in the mainstream of this Court's decisions regarding the extent to which civil courts may intrude on religious matters.

As the Court of Appeals noted, "the parties do not allege that Minnesota contract and trust law lacks a secular purpose or that its primary effect inhibits or advances religion." (App. at A-6). Thus, the Court of Appeals focused on

> whether review of this dispute would cause excessive entanglement between church and state and whether, under *Jones* [*v. Wolf*, 443 U.S. 595

(1979)], this dispute can be resolved by neutral principles of law.

(App. at A-6). An examination of the Court of Appeals' decision discloses the deeply religious nature of the underlying disputes and the inability to resolve the disputes based on neutral principles of law.

- Petitioners argue that the Court of Appeals "misapplied"[13] *Serbian Eastern Orthodox Diocese of U.S. & Canada v. Milivojevich*, 426 U.S. 696 (1976), on the grounds that "this case does not involve core issues of ecclesiastical concern," nor addresses matters of internal discipline or the government or direction of a religious organization. (Petition at 12-13).

In fact, as the Court of Appeals held, the ELCA created the Board of Pensions "**both** to provide for pastors' retirement needs **and** assist the ELCA in accomplishing doctrinal goals." (App. at A-8) (emphasis in original). The Lutheran World Federation "declared that apartheid must be rejected as a matter of the Lutheran faith itself." (App. at A-10). The Constituting Convention of the ELCA passed a resolution stating that "divestment was the appropriate response to the 'sin of apartheid.'" (App. at A-10). The Churchwide Assembly, the highest legislative authority of the ELCA, voted to divest funds from companies with holdings in South Africa, and directed the Board of Pensions to implement a divestment policy. (App. at A-4).

[13] A petition for writ of certiorari "is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." S. Ct. R. 10.

- Petitioners argue that the Court of Appeals "misapplied" *Jones v. Wolf*, 443 U.S. 595 (1979), on the grounds that "the District Court would not have to review church doctrine or the ELCA's motives to determine whether the ELCA breached their contractual and fiduciary duties." (Petition at 11-12).

In fact, as the Court of Appeals held, the plan document, which governs the relationship between Petitioners and the Board of Pensions, requires the Board of Pensions to discharge its duties "with the care that a prudent person would use in the conduct of an enterprise **of like character with like aims**" (App. at A-8) (emphasis added), thereby requiring a court to examine the Board of Pensions' aims and motives (App. at A-8). The Board of Pensions' aims and motives are defined, in part, by its Articles of Incorporation, which provide that the Board is "organized and shall be operated exclusively for religious purposes and exclusively for the benefit of and to assist in carrying out the purposes of the ELCA." (App. at A-4).

- Petitioners argue that the Court of Appeals "misapplied" *Lemon v. Kurtzman*, 403 U.S. 602 (1971), on the grounds that civil review of the adoption of the equivalency policy "would in no way require" the "comprehensive, discriminating and continuing state surveillance" proscribed under *Lemon*. (Petition at 13-14).

In fact, as the Court of Appeals held, the implication of Petitioners' claims is that a civil court would be permitted to rescind pension plan participation "every time a group of dissenting participants disagreed with the Board of Pensions' social or moral investment strategies." (App. at A-10). Civil courts would become the final arbiter of internal church decisions as to how to manage pension assets in a manner consistent with the doctrine and decisions of the church's legislative

authorities—"comprehensive, discriminating and continuing state surveillance."

The Court of Appeals decision is well within the historical mainstream of this Court's jurisprudence which, though much of it predates *Lemon*, informs analysis of the scope of prohibited entanglement between state and church. *E.g.*, *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871); *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94 (1952); *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969); *Milivojevich*, 426 U.S. 696.

CONCLUSION

For all the reasons stated above, this Court should deny the petition for a writ of certiorari.

Dated this 5th day of June, 1996

Respectfully submitted,

John D. French
Counsel of Record
Bonnie M. Fleming
Thomas H. Bennin
FAEGRE & BENSON LLP
2200 Norwest Center
90 South Seventh Street
Minneapolis, MN 55402
(612) 336-3000

Attorneys for Respondent Board of Pensions of the Evangelical Lutheran Church in America

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STATE OF MINNESOTA

IN COURT OF APPEALS

C8-95-882
CX-95-883

Hennepin County
District Court File
No. 9316711

Kalitowski, Judge

The Reverend Thomas L. Basich, et al.,

Respondents,

Robert C. Bell
Peterson, Bell, Converse & Jensen
310 Rosedale Towers
1700 West Highway 36
Roseville, MN 55113

Lynn E. Basich
3000 North Hamline Avenue
Roseville, MN 55113

vs.

Board of Pensions,
Evangelical Lutheran Church
in America (ELCA),

Appellant (C8-95-882),
Defendant (CX-95-883),

John D. French
Bonnie M. Fleming
Thomas H. Bennin
Brendan W. Randall
Faegre & Benson
2200 Norwest Center
90 South Seventh Street
Minneapolis, MN 55402

Evangelical Lutheran Church in America (ELCA),

Defendant (C8-95-882),
Appellant (CX-95-883).

Robert H. Rydland
LeVander, Zotaley, Vander Linden & Rydland
720 Northstar West
625 Marquette Avenue
Minneapolis, MN 55402

Michael Stokes Paulsen
229 19th Avenue South
Minneapolis, MN 55455

Charles T. Nixon
800 Title Insurance Bldg.
400 Second Avenue South
Minneapolis, MN 55401
(For Amici Curiae
The Church of the
Nazarene, et al.)

Filed November 28, 1995
Office of Appellate Courts

SYLLABUS

The Establishment Clause of the First Amendment and the Freedom of Conscience Clause of the Minnesota Constitution deprive the district court of subject matter jurisdiction over a breach of contract action where respondent pastors allege that the Evangelical Lutheran Church of America wrongfully directed the church's board of pensions to invest pursuant to social and moral concerns rather than solely in the pastors' best financial interest.

Reversed.

Considered and decided by Kalitowski, Presiding Judge, Huspeni, Judge, and Davies, Judge.

OPINION

KALITOWSKI, Judge

Respondents, several Lutheran pastors, a lay employee and a Lutheran congregation (Pastors), filed this individual action for breach of contract and breach of fiduciary duty against appellants, the Evangelical Lutheran Church of America (ELCA) and the Board of Pensions of the Evangelical Lutheran Church of America (Board of Pensions). The ELCA and the Board of Pensions moved for summary judgment on the grounds that the First Amendment of the United States Constitution and the Freedom of Conscience Clause of the Minnesota Constitution deprive the court of subject matter jurisdiction in this dispute. The district court denied the motion.

FACTS

The Pastors participate in defined contribution pension accounts, contributed to by their congregations and administered by the Board of Pensions. The Pastors allege that the Board of Pensions has mismanaged funds by investing and divesting pursuant to social concerns rather than solely in the economic best interests of the plan participants.

The ELCA and the Board of Pensions are organized as Minnesota nonprofit corporations. The ELCA is comprised of 65 Synods governing 11,000 congregations. Each Synod elects representatives to the Churchwide Assembly, the highest legislative authority in the ELCA. When the Churchwide Assembly is not in session, the ELCA is governed by the Church Council. The Board of Pensions was established by the ELCA in 1988 to provide retirement income and benefits

to Lutheran pastors and lay church employees. The ELCA Constitution provides that the Board of Pensions is to manage and operate the pension fund with the "design and policy adopted by the Churchwide Assembly." The Board of Pension's Articles of Incorporation provide that the Board is

> organized and shall be operated exclusively for religious purposes and exclusively for the benefit of and to assist in carrying out the purposes of the ELCA.

The ELCA Churchwide Assembly and Council have final authority and control over policies implemented by the Board of Pensions.

In 1977 the Lutheran World Federation Assembly declared that apartheid was so contrary to the Lutheran understanding of believers in Christ that it must be rejected as a matter of faith itself. The ELCA expressed its opposition to apartheid by passing a resolution to "see that none of our ELCA pension funds will be invested in companies doing business in South Africa." The Board of Pensions responded in 1988 by adopting the "equivalency policy," whereby the Board of Pensions agreed to divest (and refrain from making new investments) in companies with South African holdings whenever the conditions of risk and return were equal between stocks and bonds held by the Board. The equivalency policy governed investment decisions until its repeal in 1993.

A dissenting group of Lutherans led by respondent Reverend Thomas Basich disagreed with the Churchwide Assembly's divestment policy. Basich and others published articles opposing the ELCA's decision to use its assets as a political weapon and condemning the Board of Pensions for "acquiescing" to the Churchwide Assembly's pressure on the issue of apartheid. Basich requested that he and others be allowed to withdraw their pension funds. The Board of Pensions denied this request. In response, Basich and others filed a derivative action suit against the Board of Pensions. This

court held the Pastors did not have standing to bring a derivative suit. Basich v. Board of Pensions of Evangelical Lutheran Church in Am., 493 N.W.2d 293, 296 (Minn. App. 1992). The Pastors then filed this action for individual relief on the grounds of breach of contract and breach of fiduciary duty.

ISSUES

1. Does the First Amendment of the United States Constitution prevent the district court from exercising jurisdiction over this dispute?

2. Does the Freedom of Conscience Clause of the Minnesota Constitution prevent the district court from exercising jurisdiction over this dispute?

ANALYSIS

A motion for summary judgment shall be granted when there is no issue of material fact and a party is entitled to judgment as a matter of law. Fabio v. Bellomo, 504 N.W.2d 758, 761 (Minn. 1993). None of the facts relevant to a determination of this summary judgment motion are disputed. The only remaining issue, therefore, is whether the federal or state constitution deprives the court of subject matter jurisdiction of the Pastors' claim. This issue is a question of law. A reviewing court is not bound by and need not give deference to a trial court's decision on a purely legal issue. Frost-Benco Elec. Ass'n v. Minnesota Pub. Utils. Comm'n, 358 N.W.2d 639, 642 (Minn. 1984).

I.

The ELCA and the Board of Pensions allege that the First Amendment to the United States Constitution deprives

the district court of subject matter jurisdiction. The First Amendment provides that

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * *.

U.S. Const. amend I. The Establishment Clause cannot easily be reduced to a single test. Rosenberger v. Rector & Visitors of the Univ. of Va., 115 S. Ct. 2510, 2528 (1995). The Supreme Court has held that for an exercise of governmental authority to be valid under the Establishment Clause, it must: (1) have a secular purpose; (2) neither inhibit nor advance religion as its primary effect; and (3) not create excessive entanglement between church and state. Lemon v. Kutzman, 403 U.S. 602, 612-13, 91 S. Ct. 2105, 2111 (1971). The Supreme Court has also applied the "principles of neutrality" test, requiring that civil courts hear only disputes which can be determined on the basis of neutral principles of law. Jones v. Wolf, 443 U.S. 595, 602, 99 S. Ct. 3020, 3025 (1979).

Applying the Lemon factors, the parties do not allege that Minnesota contract and trust law lacks a secular purpose or that its primary effect inhibits or advances religion. Therefore, we need only consider whether review of this dispute would cause excessive entanglement between church and state and whether, under Jones, this dispute can be resolved by neutral principles of law.

Whether government action causes excessive entanglement depends on the nature of the intrusion into religious administration, the character and purpose of the involved institutions and the resulting relationship between the religious authority and government. Lemon, 403 U.S. at 614 -15, 91 S. Ct. at 2112. If a claim involves core issues of ecclesiastical concern, the potential for government entanglement in religious matters prevents judicial review. Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696, 721-23, 96 S. Ct. 2372, 2386-87 (1976).

This court has held that the Establishment Clause prevents civil courts of Minnesota from considering a breach of contract claim brought by a pastor against her former church. Black v. Snyder, 471 N.W.2d 715, 720 (Minn. App. 1991), review denied (Minn. Aug. 29, 1991). In Black, a Lutheran associate pastor filed a discrimination charge against her supervising pastor alleging sexual harassment. Id. at 717-18. Shortly thereafter, the congregation voted to discharge Black and Black sued the church for, among other claims, breach of contract. Id. at 718. This court held that hearing Black's breach of contract claim would cause excessive entanglement because it would require the court to examine issues of church doctrine and governance and would require court review of the church's motives. Id. at 720.

This court has also refused to hear a defamation case to avoid excessive entanglement under the Establishment Clause. Schoenhals v. Mains, 504 N.W.2d 233, 236 (Minn. App. 1993). The Schoenhals alleged that their pastor defamed them by communicating to the congregation that they had been poor parishioners. Id. at 234-35. The pastor alleged that his statements were based in the Bible and in the church's religious beliefs and practices. Id. at 235. This court found that while the pastor's statement appeared unrelated to church doctrine, court review of the defamatory statements would require an inquiry into the church's motives and disciplinary matters. Id. at 236. Accordingly, this court found that to prevent excessive entanglement, the district court must not hear the case. Id.

The Pastors argue that a review of this case will not require the court to entangle itself in issues of Lutheran doctrine. We disagree. Delegates to the Churchwide Assembly, the highest legislative authority of the Lutheran church, voted to divest funds from companies with holdings in South Africa and directed the Board of Pensions to implement the divest-

ment policy. While the Board of Pensions is required to prudently invest its holdings, the ELCA created the Board to both provide for pastors' retirement needs and assist the ELCA in accomplishing doctrinal goals. The ELCA enacted the equivalency policy in an effort to further its social and doctrinal goals of opposing apartheid. Accordingly, any review of the Board of Pensions' divestment and equivalency policies would entangle the court in reviewing church doctrine and policy.

In addition, the district court would be required to examine church doctrine and organization to determine whether a breach of contract occurred in this case. The plan document is the primary "contract" between the parties. It provides that the Board of Pensions shall discharge its duties with the care that a prudent person would use in the conduct of an enterprise of like character with like aims. Thus, the district court would be required to examine the ELCA's "aims" before it could determine the breach of contract issue. Such inquiry into church motives is forbidden by the Establishment Clause of the United States Constitution.

The Pastors also contend that this case can be resolved on neutral principles of contract and trust law. We disagree. The flaw in this contention is illustrated by the Pastors' admission that the ELCA could properly prohibit investments by the Board of Pensions in morally obnoxious commercial activity such as prostitution or pornography. There are no neutral principles of law that would enable a district court to distinguish between investments that Lutheran doctrine should find to be morally acceptable and those that it should find to be morally unacceptable. We conclude that the Establishment Clause of the First Amendment deprives the district court of subject matter jurisdiction in this dispute because review of this issue would require the district court to look beyond neutral principles of contract and trust law and entangle itself in issues of church doctrine.

II.

The ELCA and the Board of Pensions allege that the Freedom of Conscience Clause of the Minnesota Constitution deprives the district court of subject matter jurisdiction. Article I, section 16 of the Minnesota Constitution provides that

> [t]he right of every man to worship God according to the dictates of his own conscience shall never be infringed * * * nor shall any control of or interference with the rights of conscience be permitted, or any preference be given by law to any religious establishment or mode of worship; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace or safety of the state * * * .

The Freedom of Conscience Clause affords greater protection for religious liberties against government action than the federal constitution. State v. Hershberger, 462 N.W.2d 393, 397 (Minn. 1990). In determining whether government action violates the Freedom of Conscience Clause, Minnesota courts consider whether: (1) the objector's belief is sincerely held; (2) the action burdens the exercise of religious beliefs; (3) the state's interest is compelling; and (4) the state action uses the least restrictive means. Hill-Murray Fed'n. of Teachers v. Hill-Murray High Sch., 487 N.W.2d 857, 865 (Minn. 1992). Under the Freedom of Conscience Clause, only governmental interests in "peace or safety" and against "acts of licentiousness" will excuse government imposition on religious freedom. Hershberger, 462 N.W.2d at 397.

This court has applied the Freedom of Conscience Clause recently to a discrimination claim brought by a lay church employee against the Eckankar church. Geraci v. Eckankar, 526 N.W.2d 391 (Minn. App. 1995), review denied (Minn.

Mar. 14, 1995), cert. denied, 116 S. Ct. 75 (1995). Carol Geraci was a computer programmer for the Eckankar church who claimed that the church discriminated against her on the basis of gender. Id. at 395. The church alleged that Geraci was terminated for failing to work harmoniously with her co-workers in disregard of the sacred teachings of Eckankar. Id. This court concluded that while the state's interest in eradicating discrimination is compelling, it could not question Eckankar's basis for decisions claimed to be doctrinally related because to do so may compel the church to conform its religious beliefs with the government's or with the majority culture's beliefs. Id. at 399.

An analysis of the four elements of the Freedom of Conscience Clause test leads us to conclude that allowing the district court's review of this matter would violate the Freedom of Conscience Clause. First, there is no question that the ELCA acted pursuant to a sincerely held religious belief by enacting the equivalency policy. The Lutheran World Federation declared that apartheid must be rejected as a matter of the Lutheran faith itself. Similarly, the Constituting Convention of the ELCA passed a resolution stating that divestment was the appropriate response to the "sin of apartheid."

Second, review of this case would burden the exercise of the ELCA's religious beliefs. If the civil courts were allowed to rescind pension plan contracts every time a group of dissenting participants disagreed with the Board of Pensions' social or moral investment strategies, the ELCA's ability to express its faith through social and moral investment would be substantially compromised. Additionally, as in Geraci, to review this case, the district court would be required to question the ELCA's basis for a decision that it contends was founded in Lutheran doctrine. Judicial inquiry into issues of church doctrine is itself a substantial burden. Id. Accordingly, a review of this case would burden the ELCA's exercise of religious beliefs.

Third, the government does not have a compelling interest in reviewing this case. The Pastors argue that there is an important governmental interest in providing a forum for review of this matter. We disagree. The forum best suited to review the Pastors' grievance is the Churchwide Assembly. The delegates to the Churchwide Assembly debated the appropriateness of the equivalency policy at length. As the highest legislative authority in the ELCA, the Churchwide Assembly's determination on this issue is final. The civil courts need not hear this case to ensure public "peace or safety" and the Pastors' breach of contract action does not allege an act of "licentiousness," as required by the Minnesota Freedom of Conscience Clause.

Because the Pastors have not alleged a compelling governmental interest in hearing this dispute, we need not address the fourth element of the Freedom of Conscience Clause test. We conclude that a review of this case would substantially burden the ELCA's exercise of religion. Therefore, the Freedom of Conscience Clause of the Minnesota Constitution deprives the district court of subject matter jurisdiction in this dispute.

DECISION

The district court erred in denying appellants' motion for summary judgment on the grounds that the court did not have subject matter jurisdiction. The district court's decision is reversed and this matter is dismissed pursuant to the Establishment Clause of the First Amendment and the Freedom of Conscience Clause of the Minnesota Constitution.

Reversed.

s/Thomas Kalitowski
11-17-95

Evangelical Lutheran Church in America

CONSTITUTIONS, BYLAWS, AND CONTINUING RESOLUTIONS

as adopted by the Constituting Convention
of the Evangelical Lutheran Church in America
(April 30, 1987)

and

as amended by the
First (1989), Second (1991), and Third (1993)
Churchwide Assemblies
of the Evangelical Lutheran Church in America

Edition current as of September 1993

INTRODUCTION

The basic commitments of the Evangelical Lutheran Church in America (ELCA) as well as its organizational outline, structural patterns, and rubrics of governance are reflected by this church's constitutions, bylaws, and continuing resolutions. These documents govern our life together as congregations, synods, and churchwide organization.

We find ourselves consulting these documents again and again to guide, direct, and assist us. They express for us, as a church body, our understanding of the nature of the church. They contain our statement of purpose and our principles of organization. They define our membership, our relationships, and our operating patterns.

While we recognize that the Evangelical Lutheran Church in America officially began operation as a church body on January 1, 1988, through the uniting of three predecessor bodies, we realize that our roots reach deep into the soil of the Lutheran Confessions and we draw constant nourishment from our biblical foundations. So we really are an old church with a different name and structure from those of our three predecessor church bodies. We are a particular gathering of people known as the Evangelical Lutheran Church in America. As part of the whole Church of Christ, we announce and declare the teachings of the prophets and apostles and seek to confess in our time the faith once delivered to the saints.

The Rev. Lowell G. Almen
Secretary

Day of commemoration
for Henry Melchoir Muhlenberg
October 7, 1993

CODIFICATION EXPLANATION

The provisions of the Constitution, the Bylaws, and the Continuing Resolutions that pertain to the same matter have been placed together. This arrangement requires that the three types of material be identified by means other than physical separation.

The three types of provisions are identified by the following devices:

a. All constitutional provisions are in bold face type.

b. All bylaw provisions are printed in light face type.

c. All continuing resolutions are printed in *italic* type.

d. A numerical codification indicates general subject, constitutional provisions, bylaw provisions, and continuing resolutions.

PREAMBLE

Convinced that the Holy Spirit is leading us toward unity in the household of God, we of The American Lutheran Church, The Association of Evangelical Lutheran Churches, and the Lutheran Church in America give thanks to God for the faith we share together in Christ and, by adopting this constitution, form a new church, in the name of the Father, the Son, and the Holy Spirit.

. . . .

Chapter 4.

STATEMENT OF PURPOSE

4.01. **The Church is a people created by God in Christ, empowered by the Holy Spirit, called and sent to bear witness to God's creative, redeeming, and sanctifying activity in the world.**

. . . .

4.03. **To fulfill these purposes, this church shall:**

a. Receive, establish, and support those congregations, ministries, organizations, institutions, and agencies necessary to carry out God's mission through this church.

b. Encourage and equip all members to worship, learn, serve, and witness; to fulfill their calling to serve God in the world; and to be stewards of the earth, their lives, and the Gospel.

. . . .

Chapter 8.

RELATIONSHIPS

8.10 **Relationship Between Congregations, Synods, and the Churchwide Organization**

8.11 **This church shall seek to function as people of God through congregations, synods, and the churchwide organization, all of which shall be interdependent. Each part, while fully the church, recognizes that it is not the**

whole church and therefore lives in a partnership relationship with the others.

. . . .

Chapter 12

CHURCHWIDE ASSEMBLY

12.10 Description and Authority of the Churchwide Assembly

12.11 The Churchwide Assembly shall be the highest legislative authority of the churchwide organization and shall deal with all matters which are necessary in pursuit of the purposes and functions of this church. The powers of the Churchwide Assembly are limited only by the provisions of the Articles of Incorporation, this constitution and bylaws, and the assembly's own resolutions.

. . . .

Chapter 14

CHURCH COUNCIL

14.10 Purpose and Meetings

14.11 This church shall have a Church Council which shall be the board of directors of this church and shall serve as the interim legislative authority between meetings of the Churchwide Assembly.

. . . .

Chapter 17.

OTHER UNITS OF THE CHURCHWIDE ORGANIZATION

17.10 Other Churchwide Units

17.11 This church may establish other churchwide units and organizations to carry out the purpose and functions of this church.

17.12. Other churchwide units include:

a. the church periodical;

b. the ELCA Foundation, operating under the Endowment Fund;

c. the Women of the ELCA;

d. the Publishing House of the ELCA; and

e. the Board of Pensions.

The Endowment Fund of the Evangelical Lutheran Church in America, the Board of Pensions of the ELCA, the Publishing House of the ELCA, and the Women of the ELCA may be separately incorporated units of this church.

. . . .

17.60. Board of Pensions

17.61 This church shall have a church pension and other benefits plans unit. This Board of Pensions shall be incorporated. Its executive director shall be president of the corporation and shall serve as its chief executive officer.

17.61.01. The Churchwide Assembly shall:

a. authorize the creation of the governance structure for this program;

b. approve the documents establishing and governing the program;

c. refer any amendments to the program initiated by the Churchwide Assembly to the Board of Pensions for recommendation before final action by the Church Council, assuring that no amendment shall abridge the rights of members with respect to their pension accumulations; and

d. direct the establishment of an appeal process within the Board of Pensions to enable participants in the plans to appeal decisions.

. . . .

17.61.07. The specific responsibilities of the Board of Pensions shall be enumerated in continuing resolutions. Such continuing resolutions may be amended by a majority vote of the Churchwide Assembly or by a two-thirds vote of the Church Council. Should the board disagree with the action of the Church Council, it may appeal the decision to the Churchwide Assembly.

17.61.A91. ***Responsibilities of the Board of Pensions***

a. This board shall manage and operate the pension and other benefits plans for this church with the design and policy adopted by the Churchwide Assembly and

shall invest the assets according to its best judgment.

b. The Investment Committee of the Board of Pensions shall receive advice and counsel from the Advisory Committee on the Church's Corporate Social Responsibility formed by the Division for Church in Society and within the context of fiduciary responsibility make appropriate recommendations to the board.

. . . .

d. This board shall provide pension, health, and other benefits exclusively for the benefit of eligible members working within the structure of this church and those benefits shall be on the same basis for all the participants.

. . . .

[Seal]

ARTICLES OF INCORPORATION

Board of Pensions
of the
Evangelical Lutheran Church in America

February 13, 1988

ARTICLE II

This corporation is organized and shall be operated exclusively for religious purposes and exclusively for the benefit of and to assist in carrying out the purposes of the Evangelical Lutheran Church in America (the "ELCA"), a Minnesota nonprofit corporation. In furtherance of these purposes this corporation shall manage and operate the worker benefits plans for the ELCA and its institutions within the design and policy adopted from time to time by the Churchwide Assembly or Church Council of the ELCA.

Trust Document

ELCA Regular Pension Trust

BOARD OF PENSIONS

[seal] Evangelical Lutheran Church in America

800 Marquette Ave., Suite 1050 • Minneapolis, MN 55402 • (612) 333-7651

January 1, 1995

Sec. 1.03 Purpose. The Regular Pension Trust is formed exclusively for religious and charitable purposes and in connection therewith exclusively for the benefit of, and to assist in carrying out the purposes of, the Evangelical Lutheran Church in America (the "ELCA"), an organization described in Section 501(c)(3) of the Internal Revenue Code of 1986, by providing pension benefits to employees of the ELCA and other organizations described in Section 501(c)(3) of the Internal Revenue Code of 1986, that are affiliated with the ELCA (including its member congregations, colleges, schools, and social service organizations), and to ordained ministers on the ELCA roster.

. . . .

. . . .

APARTHEID

Statements and actions of
The American Lutheran Church
dealing with the apartheid
system and justice for all
peoples in South Africa
and Namibia: 1980-1985

- "Goals for Combating Apartheid" (1985)
- "Goals for Combating Apartheid" (1981)
- "Apartheid in Southern Africa—Is It Any of Our Business?" (1981)
- "Human Rights of the People of Namibia" (1980)
- "Opposition to Apartheid" (1980)
- South Africa—Divestment (1981)

[Seal]

III. Apartheid in Southern Africa— Is It Any of Our Business? (1981)

. . . .

2. "STATUS CONFESSIONIS"

The American Lutheran Church has declared its opposition to the apartheid system in the strongest of terms. Its 1980 General Convention voted unanimously to "express its unequivocal rejection of apartheid and all other forms of racial discrimination in our own society as well as in other nations, and [to] declare apartheid to be a matter of 'status confessionis.'"

The term means "a state of confession." It was applied to the situation of Lutheran churches in southern Africa, White and Black, by the Sixth Assembly of the Lutheran World Federation, meeting in Tanzania in June 1977. That gathering of the worldwide Lutheran family was determined to say that the apartheid system is so oppressive and so contrary to the Lutheran understanding of the unity of believers in Christ and the equality of the entire human family that it must be rejected as a matter of the faith itself:

> "On the basis of faith and in order to manifest the unity of the church," said the Sixth Assembly, "churches [should] publicly and unequivocally reject the existing apartheid system."

Apartheid is not simply a typical political question, about which Christians may hold differing opinions. It must be viewed from much the same theological perspective that the Confessing Church in Germany adopted in opposing the Hitler regime 40 some years ago. Apartheid is to be rejected because it violates a central belief of the church as expressed in the

Augsburg Confession. The immediate context for the LWF Sixth Assembly action was the separation of Black and White Lutherans in South Africa. As long as that cultural pattern (reinforced by South African law) was followed by the churches, an unbiblical criterion for unity—racial identity—was being used. And since that criterion goes beyond Augsburg's requirement (unity exists when there is agreement on the proclamation of the Word and the administration of the Sacraments), the racial test of unity is not valid and must be rejected.

Apartheid, therefore, presents the church with a "state of confession" because it attacks, in its impact on both church and society, the very heart of the church's confession of faith. By its 1980 convention action, the ALC is affirming the same position. It means that, for the ALC corporately, there can be no argument over whether apartheid is acceptable or reformable. It means that apartheid is viewed by us as simply and starkly in conflict with the biblical faith we hold. It is not a political ideology with which believers may compromise, but must be opposed by whatever means are at hand.

. . . .

Minutes

EVANGELICAL LUTHERAN CHURCH IN AMERICA
CONSTITUTING CONVENTION
April 30—May 3, 1987
The Ohio Center
Columbus, Ohio

Published under the auspices of Lowell G. Almen, Secretary
Evangelical Lutheran Church in America

ELCA PUBLISHING HOUSE
Augsburg Publishing House/Fortress Press
Minneapolis, Minnesota

Voted: **That the following resolution be adopted by a standing vote:**

ELCA 87.2.50 Whereas, the ALC, LCA, and AELC have struggled to stand with you in hope for the coming of freedom, peace, and justice for all people in your lands; and

Whereas, the ALC, LCA, and AELC have long recognized, with the world, the United Nations, and the World Court's judgment that Namibia is illegally occupied by South Africa; and

Whereas, the ALC, LCA, and AELC have continually spoken and tried to act in opposition to the sin of apartheid; and

Whereas we give thanks to God for your witness in the face of your continued suffering, and also give God thanks for your faithfulness and courage; and

Whereas, we have been enriched and inspired by our lives and faith; therefore, be it

Resolved, that we, the delegates of the Constituting Convention of the ELCA, greet you, the members of the Evangelical Lutheran Church in South Africa (ELCSA) and United Evangelical Lutheran Churches of Southwest Africa/Namibia (UELCSWA/N); and be it further

Resolved, that we, the delegates of the Constituting Convention of the ELCA, assure you that our prayers and solidarity with you in the Gospel and in your struggle for freedom with justice

will continue unabated; and be it further

Resolved, that we, the delegates of the Constituting Convention of the ELCA, express our unqualified opposition to the apartheid system in South Africa, and the illegal occupation and oppression by South Africa of Namibia; and be it further

Resolved, that we pledge to you that we will work tirelessly to see that none of our ELCA Pension Funds will be invested in companies doing business in South Africa; and be it finally

Resolved, that the text of this resolution be sent to the President of the U.S.A., the President of South Africa, and our Lutheran church leaders in South Africa and Namibia.

ELCA Board of Pensions Policy Statement

As part of the Evangelical Lutheran Church in America, the Board of Pensions continues to be sympathetic to the plight of the oppressed people of South Africa/Namibia. It joins Christians throughout the world in condemning, without reservation, the policies of apartheid that prevail in those nations. The Board of Pensions has declared its desire fully to reflect the action of the Constituting Convention with respect to divestment for all investments to the extent permitted by the Board's fiduciary responsibilities.

The Board of Pensions of the ELCA, as have the Boards of Pensions of the predecessor bodies, has expended a great effort in considering how it can respond, within the fiduciary responsibilities placed upon the Board by Minnesota trust law and the ELCA Bylaws [16.51.C87 (b) *"The Committee on Investments of the Board of Pensions shall receive advice and counsel from the Advisory Committee on the Church's Corporate Social Responsibility formed by the Commission for Church in Society and within the context of fiduciary responsibility make appropriate recommendations to the board."*] to the will of the church as expressed, first in the Constituting Convention relative to divestment of U.S. companies with South Africa investments and, second, by the Church Council.

The Board is responsible not only to the ELCA as a whole, but also, as fellow Christians, to our oppressed brothers and sisters of South Africa/Namibia. Also, the Board is responsible to the members of the Pension Plan and to their beneficiaries. The Board must constantly bear in mind that the trust assets it manages do not belong to the ELCA, but to the members of the Plan. Fiduciary responsibility means that the Board is bound, not only by trust law, but also by the ELCA, to consider in the first instance, the interests of the members

and beneficiaries, and exercise its responsibilities in a prudent manner for the sole purpose of the financial well-being of the members and beneficiaries.

Taking the above into consideration, the Board of Pensions has chosen the following steps:

First, the Board of Pensions has directed that, whenever the conditions of risk and return are equal in the choice among stocks and bonds held by the Board on behalf of Plan members, or available for purchase, the holdings in companies with South Africa investments will be divested, and similarly, investments in these companies will not be made.

Second, in order to give the members of the pension plans maximum opportunity to direct their own accumulations to the existing Social Purpose Funds, which have no holdings in companies with direct investments in South Africa, the Board seeks agreement from the Church Council to amend the Pension Plan so as to allow all non-retired members freely to respond to the South African divestment issue by transferring their accumulations among funds, and specifically to and from the Social Purpose Funds.

Third, the Board seeks approval from the Church Council to establish a third Social Purpose Fund, a "balanced fund" that includes both stocks and bonds.

Fourth, although the Board of Pensions is prohibited from offering investment advice to members, it will fully inform all plan members regarding the nature and characteristics of the Social Purpose Funds so that members will know the issues involved in transferring their assets to, or from, Social Purpose Funds. The Advisory Committee is asked to recommend screens for the Social Purpose Funds to the Board for evaluation and approval.

Fifth, the Board of Pensions will continue to receive advice on proxy matters from the Corporate Social Responsibility Advisory Committee, and will respond cooperatively in shareholder actions to the extent that such actions are in the best interests of the Plan members.

Sixth, the Board of Pensions is the manager of various funds that belong to other units of the Church and as such is amenable to direction from them as to the investment of these funds.

Seventh, the Board will continue to seek constructive ways to deal with the issue of divestment in companies doing business in South Africa.

Finally, if the Church Council deems the foregoing seven steps to be an insufficient response, the Board of Pensions is willing to engage legal counsel to prepare a petition to come before the court of appropriate jurisdiction seeking an interpretation of the laws governing fiduciary duties that would allow the Board to conform to the Church Council advice respecting all funds managed by the Board. This approach to the court would be made because the Board has requested and received opinions from three different law firms cautioning that divestment may constitute a breach of fiduciary responsibility. The Board of Pensions will take this action if, and only if, the Church Council advises that it be undertaken and agrees to allocate funds sufficient to reimburse the Board of Pensions for all expenses related to it.

EVANGELICAL LUTHERAN CHURCH IN AMERICA
CHURCH COUNCIL
July 10-11, 1988

MINUTES Page[s] 31[-32]

. . . .

VOTED:
CC88.7.83 To affirm:

that the resources managed by the ELCA are to be invested or expended in ways that enhance the mission of this church;

that the Board of Pensions, as a church-wide unit of the ELCA, bears responsibility both to its members and beneficiaries and to the ELCA as a whole; and, in the light of the action of the ELCA Constituting Convention, that the Board of Pensions bears a clear responsibility to respond to the oppression of our brothers and sisters in South Africa and Namibia; and

that the Board of Pensions will fully reflect the action of the Constituting Convention that "none of our ELCA Pension Funds . . . be invested in companies doing business with South Africa," within the context of its fiduciary responsibility.

To encourage the Board of Pensions to do all in its power to accomplish this goal as quickly as legally possible and to come to the Novem-

ber meeting of the Church Council with a plan that will result in the significant reduction of funds invested in South Africa in the near future.

To request that the Board of Pensions provide semiannual reports to the Church Council that include separate listings of companies in which it has invested that directly or indirectly do business with South Africa;

To request that the Board of Pensions prepare for the November 1988 meeting of the Church Council:

amendments to the pension plan which would allow all non-retired members to transfer their accumulations among funds, and specifically to and from the Social Purpose Funds; and

a description of a third Social Purpose Fund, which would be a "balanced fund" including both stocks and bonds.

To request that the Board of Pensions and the Commission for Church in Society explore ways to inform fully all plan members regarding the nature and characteristics of the Social Purpose Funds.

To request that the Board of Pensions and the Commission for Church in Society to explore jointly the feasibility of petitioning the court of appropriate jurisdiction to seek an interpretation of the laws governing fiduciary responsi-

bility as such laws relate to the divestment issue within the broad scope of the mission of the church; and that the Commission for Church in Society and the Board of Pensions report their findings to the Church Council.

(3)

No. 95-1796

Supreme Court, U.S.
FILED
JUN 4 1996
CLERK

In The

Supreme Court of the United States

October Term, 1995

THE REVEREND THOMAS L. BASICH, et. al.

Petitioners,

v.

BOARD OF PENSIONS, EVANGELICAL LUTHERAN CHURCH IN AMERICA (ELCA), a Minnesota non-profit corporation; EVANGELICAL LUTHERAN CHURCH IN AMERICA (ELCA), a Minnesota non-profit corporation,

Respondents.

On Petition For A Writ of Certiorari To The Minnesota Court of Appeals

RESPONDENT EVANGELICAL LUTHERAN CHURCH IN AMERICA'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Robert H. Rydland
Counsel of Record
LeVander, Zotaley, Vander Linden & Rydland
720 Northstar West
625 Marquette Avenue
Minneapolis, MN 55402
(612) 339-6841
Counsel for Respondent
Evangelical Lutheran Church in America

RULE 29.6 LIST

The Evangelical Lutheran Church in America ("ELCA" or "Church") is a Minnesota non-profit religious corporation which issues no stock. The Board of Pensions of the Evangelical Lutheran Church in America ("Board of Pensions") is a churchwide unit and a non-profit religious corporation designated by the Constitution, Bylaws and Continuing Resolutions of the ELCA with the responsibility to manage and operate the pension and other benefit plans for the Church.[1]

---

[1] All, or at least the majority, of the members of the governing boards of the following non-profit corporations, which also issue no stock, are elected by the Evangelical Lutheran Church in America:

1. Board of Pensions of the Evangelical Lutheran Church in America;
2. Publishing House of the Evangelical Lutheran Church in America;
3. Mission Investment Fund of the Evangelical Lutheran Church in America;
4. National Lutheran Campus Ministry Inc.;
5. ELCA Risk Management Inc.;
6. ELCA University and College Health Inc.; and
7. Lutheran Medical Center.

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APPENDIX

EXHIBIT A, MINNESOTA COURT OF APPEALS DECISION, *BASICH V. BOARD OF PENSIONS (ELCA)* A-1

EXHIBIT B, "APARTHEID: STATEMENTS AND ACTIONS OF THE AMERICAN LUTHERAN CHURCH DEALING WITH THE APARTHEID SYSTEM AND JUSTICE FOR ALL PEOPLES IN SOUTH AFRICA AND NAMIBIA: 1980-1985" B-1

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CONSTITUTIONAL PROVISIONS

The Freedom of Conscience Clause, Article I, Section 16, of the Constitution of the State of Minnesota 1, 2, 7, 9, 11, 12, 13

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OTHER AUTHORITIES

Stern, Gressman, Shapiro & Geller, *Supreme Court Practice* (7th ed. 1993) 15

OPINIONS BELOW

The Minnesota Court of Appeals' decision is reported at *Basich v. Board of Pensions (ELCA)*, 540 N.W.2d 82 (Minn. App. 1995), a copy of which appears for the Court's convenience in Appendix A to this Brief (hereafter "App. A-").[2] The Supreme Court of Minnesota's denial of respondents' Petition for Review dated January 25, 1996, appears in Petitioners' Appendix (hereafter "Pet. App.") at Pet. App. A-1.

STATEMENT OF JURISDICTION

Petitioners seek a Writ of Certiorari pursuant to 28 U.S.C. § 1257(a). The decision below rests upon an independent and adequate state constitutional law ground. This Court therefore lacks jurisdiction to review the alternative federal law ground of decision. Moreover, the questions presented for review in the petition regarding the unconstitutionality of the Court of Appeals' decision were never presented to the Minnesota courts.

CONSTITUTIONAL PROVISIONS INVOLVED

The Freedom of Conscience Clause, Section 16, Article I

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[2] Petitioners submitted a version of the Court of Appeals' opinion which was erroneous in an important respect, *see* footnote 7.

of the Constitution of the State of Minnesota provides:

> The enumeration of rights in this constitution shall not deny or impair others retained by and inherent in the people. The right of every man to worship God according to the dictates of his own conscience shall never be infringed; nor shall any man be compelled to attend, erect or support any place of worship, or to maintain any religious or ecclesiastical ministry, against his consent; nor shall any control of or interference with the rights of conscience be permitted, or any preference be given by law to any religious establishment or mode of worship; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of the State, nor shall any money be drawn from the treasury for the benefit of any religious societies or religious or theological seminaries.

The First Amendment of the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

This lawsuit arose out of a controversy between a small group of Lutheran pastors and their denomination's governing authorities over the proper Christian response of the ELCA to the ongoing sin of apartheid in South Africa. The ELCA is the largest Lutheran denominational body in the United States, with over 11,000 congregations, more than five million members, and over 17,000 ordained ministers. The ELCA was formed by the 1988 merger of three Lutheran denominations, The American Lutheran Church (ALC), the Lutheran Church in America (LCA) and the Association of Evangelical Lutheran Churches (AELC).

The ELCA is organized in accordance with its Constitutions, Bylaws, and Continuing Resolutions into congregations, synods, and churchwide organizations. Each synod elects representatives to the Churchwide Assembly, which is the highest legislative and ecclesiastical authority of the Church and is responsible for establishing churchwide policy. A-218 - A-219 below. (Citations of the form "A-___ below" are to the Appendix of the ELCA submitted to the Minnesota Court of Appeals.)

The Board of Pensions is a churchwide unit which, pursuant to the ELCA Constitution, is organized as a separate corporation with responsibility for the management and operation of the Pension and Other Benefit Plans of the ELCA. The pension investments administered by the Board of Pensions are managed pursuant to documents approved by the ELCA. These documents include, among others, the ELCA

Constitution, Bylaws and Continuing Resolutions, the Articles of Incorporation of the Board of Pensions, the Regular Pension Plan and the Regular Pension Trust. The Restated Articles of Incorporation of the Board of Pensions of the ELCA provide:

> [t]his corporation is organized and shall be operated exclusively for religious purposes and exclusively for the benefit of and to assist in carrying out the purposes of the Evangelical Lutheran Church in America (the 'ELCA'), a Minnesota non-profit corporation.

Appendix of Appellant Board of Pensions, ELCA, Volume I, BOP-32 - BOP-33 below. The Trust Document governing management of the pension funds involved herein provides that the trust is

> formed exclusively for religious and charitable purposes and in connection therewith exclusively for the benefit of, and to assist in carrying out the purposes of, the Evangelical Lutheran Church in America.

Appendix of Appellant Board of Pensions, ELCA, Volume II, BOP-507 below.

The ELCA pursued a policy of gradual divestment of all church funds, including pension funds, in South African investments, pursuant to the Church's religious convictions as determined and expressed by the Churchwide Assembly. The Lutheran churches' vigorous opposition on religious grounds to apartheid in South Africa dates back to the 1970's. In 1977, the

Lutheran World Federation (of which the ALC and LCA were members and the ELCA is now a member), meeting in Dar es Salaam, Tanzania, declared apartheid to be

> so oppressive and so contrary to the Lutheran understanding of the unity of believers in Christ and the equality of the entire human family that it must be rejected *as a matter of the faith itself.*

App. B-2 (emphasis added). The Dar es Salaam Assembly declared opposition to apartheid to be a matter of "*status confessionis*," that is, a foundational "confession" or principle of the Lutheran Church. Vigorous opposition to and commitment to work to end apartheid thus became a critical article of faith of the Lutheran Church, world-wide, and one of the defining social principles of the Lutheran World Federation and the ELCA.[3]

Shortly after the Dar es Salaam Assembly, The American Lutheran Church (ALC) passed resolutions declaring opposition to apartheid to be a matter of *status confessionis* and declaring its commitment to divestiture as "the most legitimate strategy in opposing apartheid and the most effective consequence of a declaration of 'status confessionis.'" A-155b below. The Lutheran Church in America (LCA) adopted similar goals, noting that

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[3] The Confessing Church in Germany adopted a similar posture of *status confessionis* with respect to opposition to the Nazi regime in Germany, and to its attempt to bring Lutheran churches in Germany under the control of the Nazi state. Opposition to Naziism and opposition to apartheid are the only two modern instances in which Lutherans have made such a stand a matter of *status confessionis*. App. B-2 - B-3.

> the ethical investor may feel morally obligated to disassociate him or herself from the injury [caused by certain social systems] by disinvestment. This is not done in the vain pursuit of moral "purity," nor in the expectation that the corporation will change its practice as a consequence, but rather in the recognition that there are moral limits beyond which one ought not to go in seeking profitable investment opportunities.

A-161 below.

At the Constituting Convention of the ELCA in 1987, the merging denominations joined in a united resolution reciting and reaffirming their continuing opposition "to the sin of apartheid," and pledging that the ELCA would "work tirelessly to see that none of our ELCA Pension Funds will be invested in companies doing business in South Africa." A-242 below. In 1988, in response to the actions of the ELCA, the Board of Pensions adopted a policy which sought to implement the Church's desire to avoid South African investments.

Petitioners are a small group of dissenting pastors who brought suit in Minnesota state court seeking to invalidate the Church's policy of gradual divestment based on religious principles on the theory that the Church's policy constituted a breach of an implied contract concerning how Church pension

funds would be managed.[4] The petitioners specifically argued below that "[t]he 'church's' position on apartheid is not a Christian doctrine." *See* Respondents' Memorandum of Law in Support of the Motion to Dismiss Appellants' Appeal below, p. 6 (emphasis in original).

Respondent ELCA and its Board of Pensions moved for summary judgment on the grounds, *inter alia*, that the First Amendment religion clauses and, separately, the Freedom of Conscience provisions contained in Article I, Section 16 of the Minnesota Constitution, barred relief because resolution of the petitioners' claims would require adjudication of matters of Church religious doctrine, discipline, polity and governance. The trial court denied the Church's motion for summary judgment. Pet. App. F-2. Under Minnesota law, these defenses are treated as jurisdictional, permitting immediate appellate review. *McGowan v. Our Savior's Lutheran Church*, 527 N.W.2d 830, 833 (Minn. 1995); *see* Pet. App. C-2 (Court of Appeals' Order denying motion to dismiss appeal).

The Minnesota Court of Appeals unanimously reversed the trial court, sustaining respondents' federal and state religious liberty defenses and directing that the amended complaint be dismissed. The Court of Appeals' decision rested on two distinct grounds. First, the court concluded that adjudication of the dissenting pastors' claims would violate the religion clauses

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[4] This litigation is one of a succession of suits brought by the same ELCA pastors against the Church. A prior lawsuit seeking injunctive relief based on the same facts but a different legal theory was dismissed. *See Basich v. Board of Pensions*, 493 N.W.2d 293 (Minn. App. 1992).

of the First Amendment.[5] The court found that the ELCA's Board of Pensions existed "to both provide for pastors' retirement needs and assist the ELCA in accomplishing doctrinal goals." App. A-9 (emphasis in original). The court further held that opposition to apartheid was part of ELCA church doctrine, and that, consequently, "review of the Board of Pensions' divestment and equivalency policies would entangle the court in reviewing church doctrine and policy." *Id.* Additionally, the court held, a trial court "would be required to examine church doctrine and organization to determine whether a breach of contract occurred in this case," since the documents alleged to create the "contract" between the pastors and the Church embraced religious concepts and referenced the religious policies and aims of the Church. *Id.*

The court also dismissed petitioners' contention that the matter could be resolved on neutral principles of contract and trust law.

> The flaw in this contention is illustrated by the Pastors' admission that the ELCA could properly prohibit investments by the Board of Pensions in morally obnoxious commercial activity such as prostitution or pornography. There are no neutral principles of law that would enable a district court to distinguish between

[5] The court framed its analysis in terms of the Establishment Clause, but relied on the "church autonomy" line of cases of this Court, decided under the religion clauses taken as a whole. *See* App. A-7 - A-8 (applying *Jones v. Wolf*, 443 U.S. 595 (1979) and *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976)).

> investments that Lutheran doctrine should find to be morally acceptable and those that it should find to be morally unacceptable.

App. A-9 - A-10.

The Minnesota Court of Appeals then, in a separate Section II of its opinion, turned to the Minnesota Constitution's religious liberty provisions, Article I, Section 16. The court noted that "[t]he Freedom of Conscience Clause affords greater protection for religious liberties against governmental action than the federal constitution." App. A-10 - A-11 (citing *State v. Hershberger*, 462 N.W.2d 393, 397 (Minn. 1990)). The court applied the four-part test developed by the Minnesota Supreme Court for analyzing Freedom of Conscience Clause claims under the Minnesota Constitution, and found that "allowing the district court's review of this matter would violate the Freedom of Conscience Clause." App. A-11 - A-12. The court remarked that "[i]f the civil courts were allowed to rescind pension plan contracts every time a group of dissenting participants disagreed with the Board of Pensions' social or moral investment strategies, the ELCA's ability to express its faith through social and moral investment would be substantially compromised." App. A-12.

Finally, the court, citing *Geraci v. Eckancar*, 526 N.W.2d 391 (Minn. App.), *review denied*, (Minn. Mar. 14, 1995), *cert. denied*, 116 S. Ct. 75 (1995) stated that, "to review this case, the district court would be required to question the ELCA's basis for a decision that it contends was founded in Lutheran doctrine." *Id.* The court concluded that judicial inquiry into church doctrine is itself a substantial burden and that a review of this case by the District Court would burden the

ELCA's exercise of religious belief. *Id.*

Petitioners sought review of the Minnesota Court of Appeals' decision by the Minnesota Supreme Court. The petition for review in that court raised the questions of the correctness of the Court of Appeals' decision on the federal religious freedom issue and the correctness of the decision on the state constitutional issue, as a matter of state law. The petition did not raise any question concerning whether the Court of Appeals' decision affirmatively violated the due process, equal protection or free speech clauses of the U.S. Constitution. The Minnesota Supreme Court denied review. Pet. App. A-1.[6]

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[6] Pursuant to Rule 15.2 of this Court, we point out the following misstatements of fact in the Petition. First, Petitioners contend (Pet. 8) that "the Plan suffered underperformance losses of more than $227 million between 1988 and 1991." No such fact was found by any lower court. This allegation is based entirely on the affidavit of one of the petitioners, using only his personal "preliminary estimates" which misleadingly omitted critical data and which failed to ascertain causation of any alleged "losses." Respondents challenged the validity of this affidavit, but the courts below did not find it necessary to rule on this issue, because respondents' state and federal constitutional objections were held to require dismissal of the complaint, rendering the accuracy of the affidavit irrelevant.

Second, Petitioners imply that the ELCA and its predecessor denominations managed pension funds "solely on the basis of traditional considerations of profit maximization" up to 1988. Pet. 8. This is not true. The record is clear that the ELCA and its predecessor denominations traditionally have taken moral concerns into account in making investment decisions, including specifically with respect to South African divestment as early as 1981 by the ALC. A-144 below. *See also* deposition testimony of one of the petitioners ("[i]t's my understanding that -- that the Board of Pensions of LCA tended to avoid the purchase of companies that produced liquor." A-283 below); Minutes of the Eleventh Biennial Convention of the LCA (1982):

> That there are, or may be moral limits beyond which the

(continued...)

SUMMARY OF ARGUMENT

The Minnesota Court of Appeals rested its judgment on two independent grounds: (i) the religion clauses of the First Amendment; and (ii) the Freedom of Conscience Clause in Article I Section 16 of the Minnesota Constitution. The decision below thus rests on an independent state law ground adequate to support the judgment. *Michigan v. Long*, 463 U.S. 1032 (1983). The Petition for Certiorari presents no substantial federal question as to the validity of that state law ruling. Indeed, the federal law challenge to the validity of the state constitutional holding was not presented in the petition for review before the Minnesota Supreme Court, and thus involves questions "not pressed or passed on below." *Illinois v. Gates*, 462 U.S. 213, 217-224 (1983).

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[6](...continued)
> church and its agencies ought not to go in seeking investment opportunity, seems generally accepted among North American Christians, although there is little or no consensus as to what those limits might be. This church has followed the generally accepted practice within American Protestantism on refraining from investing in liquor or tobacco companies, presumably on the assumption that these products are harmful even though the moderate use of them has been traditionally accepted in Lutheran circles.

Reply Brief and Appendix of Appellant ELCA below, RA-28. The Minnesota Court of Appeals' opinion found that the Petitioners' had "admi[tted] that the ELCA could properly prohibit investments by the Board of Pensions in morally obnoxious commercial activity." App. A-9.

There is no conflict among the decisions of lower federal or state courts on the questions presented. Nor does this case present any issue of continuing or recurring significance. The facts involve the unique context of the Evangelical Lutheran Church in America's policy of gradual divestment of South African investment holdings between the years 1987-1993, as an act of spiritual conscience directed at the government of South Africa at that time. The factual situation that gave rise to this dispute has ended and no similar cases are pending before any other court in the United States.

ARGUMENT

I. THE JUDGMENT BELOW RESTS ON AN ADEQUATE AND INDEPENDENT STATE CONSTITUTIONAL LAW GROUND.

The first question presented by petitioners, whether the Minnesota Court of Appeals correctly found that the First Amendment bars adjudication of the issues raised in the complaint, is not properly before this Court because the decision below rests independently on a state law ground that fully supports the judgment. The Minnesota Court of Appeals could scarcely have been more explicit in setting forth the Article I, Section 16 Freedom of Conscience Clause ground as a separate and independent basis for ruling in favor of respondents. *See* App. A-10 - A-13 (analyzing this issue separately from the federal law issue, and applying cases decided on this state law

constitutional ground).[7] This Court, of course, has no jurisdiction to review that state law holding. It therefore has no jurisdiction to review the judgment, because the state law ground was sufficient for the Minnesota Court of Appeals' holding. *Michigan v. Long*, 463 U.S. 1032 (1983).

This case falls within none of the exceptions to the rule that this Court lacks jurisdiction to review judgments of state court systems that rest on an independent and adequate state law ground. There is no question of the "adequacy" of the state law ground to support the judgment. The Minnesota Court of Appeals held that the Minnesota Constitution requires that the complaint be dismissed. No federal law determination at all is necessary to support this judgment. Nor is there any question of the "independence" of the state law ground. The state court's opinion does not cite the federal Constitution, or even any federal law case, in support of its state law holding. The court cited only Minnesota state cases interpreting the Minnesota Constitution. Indeed, the leading state case relied on, *State v. Hershberger*, explicitly distinguishes Minnesota's interpretation of its own religious liberty clauses from this Court's interpretation of the First Amendment religion clauses. *Hershberger*, 462 N.W.2d at 397-99.

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[7] To emphasize the separateness of the First Amendment analysis from the Minnesota Constitution Freedom of Conscience analysis, the Court divided their decision into two distinct sections, identified as "**I**" (containing the First Amendment analysis) and "**II**" (containing the Freedom of Conscience analysis). The Roman Numerals were omitted in the copy of the case presented to this Court in Pet. App. B by Petitioners (compare App. A-6 and App. A-10 to Pet. App. B-6 and Pet. App. B-9).

> Whereas the first amendment establishes a limit on government action at the point of prohibiting the exercise of religion, section 16 precludes even an infringement on or an interference with religious freedom. Accordingly, government actions that may not constitute an outright prohibition on religious practices (thus not violating the first amendment) could nonetheless infringe on or interfere with those practices, violating the Minnesota Constitution.

Id. (emphasis in original). There is thus no issue of a state constitutional ground being tied to an interpretation of an analogous provision of the U.S. Constitution. *Cf. Michigan v. Long*, 463 U.S. at 1043-44.

II. THE REMAINING FEDERAL QUESTIONS WERE NOT PRESSED OR PASSED ON BELOW, PRESENT NO SUBSTANTIAL FEDERAL QUESTION, AND INVOLVE NO CONFLICT AMONG LOWER COURTS.

The petition for certiorari raises -- for the first time in this case -- a series of assertions that dismissal of the petitioners' claims on state constitutional grounds would somehow violate the federal constitution. These contentions were not presented in the petition for review to the Minnesota Supreme Court. They should be deemed waived, under the rule that this Court generally will not consider questions "not pressed or passed

upon below." *Illinois v. Gates*, 462 U.S. at 222.

This is not a case where a state court of last resort has issued a "surprise" decision in which a federal issue is born out of a state law holding and the state court of last resort thereafter declines to entertain a petition for rehearing on the issue, leaving a litigant with no recourse but to raise it for the first time in a petition for certiorari addressed to this Court. *See* Stern, Gressman, Shapiro & Geller, *Supreme Court Practice* 130 (7th ed. 1993) (citing *Saunders v. Shaw*, 244 U.S. 317, 320 (1917)). *See also Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 85-86 n.9 (1980). Here, the putative federal constitutional challenge to the state constitutional holding was clearly presented (at the latest) by the Court of Appeals' decision. The court's state-law holding was not challenged on federal constitutional grounds in the Minnesota Supreme Court. Under *Illinois v. Gates*, it should not be open to petitioners to raise such challenges for the first time in the petition for certiorari.

In any event, petitioners' claimed federal law challenges to the Minnesota Court of Appeal's state constitutional holding are insubstantial. First, petitioners claim that the Minnesota law holding violates federal due process by "depriv[ing] Petitioners of a civil forum to protect their rights." Pet. 16. This claim is meritless. The Minnesota courts did not deprive petitioners of a *forum* for hearing their claims; they merely held that petitioners *lost* on their claims as a matter of state law -- that is, that respondents had a valid state law defense that barred relief on the theories asserted. No due process issue is presented by that holding.

Second, petitioners claim that the holding below violates the federal equal protection clause because it treats religious "contracts" differently from purely secular contracts. Pet. 18.

It is true that the holding below finds a state constitutional liberty for churches that does not exist for non-religious organizations. But this does not violate "equal protection," unless all accommodations of religion not required by the federal free exercise clause also violate equal protection. This is plainly not the case. *See, e.g., Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 334 (1987). Indeed, under petitioners' argument, any state constitutional provision that conferred rights broader than the federal constitution recognizes would be subject to "strict scrutiny" under the equal protection clause. Such an extravagant claim finds no support in any decision of this Court.

Third, petitioners assert that the state court's decision violates the free speech clause of the First Amendment, by "forcing an individual to contribute money to a political purpose in which the individual does not believe." Pet. 18-19 (citing *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977)). This too is a novel claim. No court has ever found a federal free speech right of individuals to interfere with the collective free exercise rights of *private* religious groups of which they are members. This case is a far cry from a state law requiring that individuals contribute money to a labor union's political activities. *Abood*, 431 U.S. 209. Here, no one has compelled petitioners to contribute money for political purposes, in the sense in which *Abood* employs that concept. Certainly the State of Minnesota has engaged in no such compulsion. Rather, the Court of Appeals simply held that the state constitution does not permit an individual to compel a court affirmatively to intervene in a church's management of pension assets established for religious purposes and pursuant to relationships created under church authority, doctrine, and governance.

Petitioners can point to no conflict among lower courts -- state or federal -- on any of these questions. Indeed, petitioners point to no other lower court cases involving the same issues. As noted above, the controversy within the ELCA over divestment of South African holdings is now a thing of the past. The facts of this case involve a Lutheran Church policy, undertaken between the years 1987 and 1993, and addressed to a unique historical situation. The factual situation that gave rise to this dispute has ended and (as far as we are aware) there are no similar cases pending before any other court in the United States.

The petition raises no substantial federal question, no conflict among lower courts, and no issue of continuing or ongoing significance.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

Robert H. Rydland
Counsel of Record for Respondent
Evangelical Lutheran Church in America
LeVander, Zotaley, Vander Linden
& Rydland
625 Marquette Avenue
720 Northstar West
Minneapolis, MN 55402
(612) 339-6841

STATE OF MINNESOTA
IN COURT OF APPEALS
C8-95-882
CX-95-883

Hennepin County District Court File No. 9316711	Kalitowski, Judge
The Reverend Thomas L. Basich, et al., Respondents,	Robert C. Bell Peterson, Bell, Converse & Jensen 310 Rosedale Towers 1700 West Highway 36 Roseville, MN 55113
vs.	Lynn E. Basich 3000 North Hamline Avenue Roseville, MN 55113
Board of Pensions, Evangelical Lutheran Church in America (ELCA), Appellant (C8-95-882), Defendant (CX-95-883),	John D. French Bonnie M. Fleming Thomas H. Bennin Brendan W. Randall Faegre & Benson 2200 Norwest Center 90 South Seventh Street Minneapolis, MN 55402
Evangelical Lutheran Church in America (ELCA), Defendant (C8-95-882), Appellant (CX-95-883).	Robert H. Rydland LeVander, Zotaley, Vander Linden & Rydland 720 Northstar West 625 Marquette Avenue Minneapolis, MN 55402

Michael Stokes Paulsen
229 19th Avenue South
Minneapolis, MN 55455

Charles T. Nixon
800 Title Insurance Bldg.
400 Second Avenue South
Minneapolis, MN 55401
(For Amici Curiae
The Church of the
Nazarene, et al.)

Filed November 28, 1995
Office of Appellate Courts

SYLLABUS

The Establishment Clause of the First Amendment and the Freedom of Conscience Clause of the Minnesota Constitution deprive the district court of subject matter jurisdiction over a breach of contract action where respondent pastors allege that the Evangelical Lutheran Church of America wrongfully directed the church's board of pensions to invest pursuant to social and moral concerns rather than solely in the pastors' best financial interest.

Reversed.

Considered and decided by Kalitowski, Presiding Judge, Huspeni, Judge, and Davies, Judge.

OPINION

KALITOWSKI, Judge

Respondents, several Lutheran pastors, a lay employee and a Lutheran congregation (Pastors), filed this individual action for breach of contract and breach of fiduciary duty against appellants, the Evangelical Lutheran Church of America (ELCA) and the Board of Pensions of the Evangelical Lutheran Church of America (Board of Pensions). The ELCA and the Board of Pensions moved for summary judgment on the grounds that the First Amendment of the United States Constitution and the Freedom of Conscience Clause of the Minnesota Constitution deprive the court of subject matter jurisdiction in this dispute.

The district court denied the motion.

FACTS

The Pastors participate in defined contribution pension accounts, contributed to by their congregations and administered by the Board of Pensions. The Pastors allege that the Board of Pensions has mismanaged funds by investing and divesting pursuant to social concerns rather than solely in the economic best interests of the plan participants.

The ELCA and the Board of Pensions are organized as Minnesota nonprofit corporations. The ELCA is comprised of 65 Synods governing 11,000 congregations. Each Synod elects representatives to the Churchwide Assembly, the highest legislative authority in the ELCA. When the Churchwide Assembly is not in session, the ELCA is governed by the Church Council. The Board of Pensions was established by the ELCA in 1988 to provide retirement income and benefits to Lutheran pastors and lay church employees. The ELCA Constitution provides that the Board of Pensions is to manage and operate the pension fund with the "design and policy adopted by the Churchwide Assembly." The Board of Pension's Articles of Incorporation provide that the Board is

> organized and shall be operated exclusively for religious purposes and exclusively for the benefit of and to assist in carrying out the purposes of the ELCA.

The ELCA Churchwide Assembly and Council have final

authority and control over policies implemented by the Board of Pensions.

In 1977 the Lutheran World Federation Assembly declared that apartheid was so contrary to the Lutheran understanding of believers in Christ that it must be rejected as a matter of faith itself. The ELCA expressed its opposition to apartheid by passing a resolution to "see that none of our ELCA pension funds will be invested in companies doing business in South Africa." The Board of Pensions responded in 1988 by adopting the "equivalency policy," whereby the Board of Pensions agreed to divest (and refrain from making new investments) in companies with South African holdings whenever the conditions of risk and return were equal between stocks and bonds held by the Board. The equivalency policy governed investment decisions until its repeal in 1993.

A dissenting group of Lutherans led by respondent Reverend Thomas Basich disagreed with the Churchwide Assembly's divestment policy. Basich and others published articles opposing the ELCA's decision to use its assets as a political weapon and condemning the Board of Pensions for "acquiescing" to the Churchwide Assembly's pressure on the issue of apartheid. Basich requested that he and others be allowed to withdraw their pension funds. The Board of Pensions denied this request. In response, Basich and others filed a derivative action suit against the Board of Pensions. This court held the Pastors did not have standing to bring a derivative suit. Basich v. Board of Pensions of Evangelical Lutheran Church in Am., 493 N.W.2d 293, 296 (Minn. App. 1992). The Pastors then filed this action for individual relief on the grounds of breach of contract and breach of fiduciary duty.

ISSUES

1. Does the First Amendment of the United States Constitution prevent the district court from exercising jurisdiction over this dispute?
2. Does the Freedom of Conscience Clause of the Minnesota Constitution prevent the district court from exercising jurisdiction over this dispute?

ANALYSIS

A motion for summary judgment shall be granted when there is no issue of material fact and a party is entitled to judgment as a matter of law. Fabio v. Bellomo, 504 N.W.2d 758, 761 (Minn. 1993). None of the facts relevant to a determination of this summary judgment motion are disputed. The only remaining issue, therefore, is whether the federal or state constitution deprives the court of subject matter jurisdiction of the Pastors' claim. This issue is a question of law. A reviewing court is not bound by and need not give deference to a trial court's decision on a purely legal issue. Frost-Benco Elec. Ass'n v. Minnesota Pub. Utils. Comm'n, 358 N.W.2d 639, 642 (Minn. 1984).

I.

The ELCA and the Board of Pensions allege that the First Amendment to the United States Constitution deprives the district court of subject matter jurisdiction. The First Amendment provides that

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * *.

U.S. Const. amend. I. The Establishment Clause cannot easily be reduced to a single test. Rosenberger v. Rector & Visitors of the Univ. of Va., 115 S. Ct. 2510, 2528 (1995). The Supreme Court has held that for an exercise of governmental authority to be valid under the Establishment Clause, it must: (1) have a secular purpose; (2) neither inhibit nor advance religion as its primary effect; and (3) not create excessive entanglement between church and state. Lemon v. Kutzman, 403 U.S. 602, 612-13, 91 S. Ct. 2105, 2111 (1971). The Supreme Court has also applied the "principles of neutrality" test, requiring that civil courts hear only disputes which can be determined on the basis of neutral principles of law. Jones v. Wolf, 443 U.S. 595, 602, 99 S. Ct. 3020, 3025 (1979).

Applying the Lemon factors, the parties do not allege that Minnesota contract and trust law lacks a secular purpose or that its primary effect inhibits or advances religion. Therefore, we need only consider whether review of this dispute would cause excessive entanglement between church and state and whether, under Jones, this dispute can be resolved by neutral principles of law.

Whether government action causes excessive entanglement depends on the nature of the intrusion into religious administration, the character and purpose of the involved institutions and the resulting relationship between the religious authority and government. Lemon, 403 U.S. at 614-15, 91 S. Ct. at 2112. If a claim involves core issues of ecclesiastical concern, the potential for government entanglement in religious

matters prevents judicial review. Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696, 721-23, 96 S. Ct. 2372, 2386-87 (1976).

This court has held that the Establishment Clause prevents civil courts of Minnesota from considering a breach of contract claim brought by a pastor against her former church. Black v. Snyder, 471 N.W.2d 715, 720 (Minn. App. 1991), review denied (Minn. Aug. 29, 1991). In Black, a Lutheran associate pastor filed a discrimination charge against her supervising pastor alleging sexual harassment. Id. at 717-18. Shortly thereafter, the congregation voted to discharge Black and Black sued the church for, among other claims, breach of contract. Id. at 718. This court held that hearing Black's breach of contract claim would cause excessive entanglement because it would require the court to examine issues of church doctrine and governance and would require court review of the church's motives. Id. at 720.

This court has also refused to hear a defamation case to avoid excessive entanglement under the Establishment Clause. Schoenhals v. Mains, 504 N.W.2d 233, 236 (Minn. App. 1993). The Schoenhals alleged that their pastor defamed them by communicating to the congregation that they had been poor parishioners. Id. at 234-35. The pastor alleged that his statements were based in the Bible and in the church's religious beliefs and practices. Id. at 235. This court found that while the pastor's statement appeared unrelated to church doctrine, court review of the defamatory statements would require an inquiry into the church's motives and disciplinary matters. Id. at 236. Accordingly, this court found that to prevent excessive entanglement, the district court must not hear the case. Id.

The Pastors argue that a review of this case will not require the court to entangle itself in issues of Lutheran doctrine. We disagree. Delegates to the Churchwide Assembly, the highest legislative authority of the Lutheran church, voted to divest funds from companies with holdings in South Africa and directed the Board of Pensions to implement the divestment policy. While the Board of Pensions is required to prudently invest its holdings, the ELCA created the Board to both provide for pastors' retirement needs and assist the ELCA in accomplishing doctrinal goals. The ELCA enacted the equivalency policy in an effort to further its social and doctrinal goals of opposing apartheid. Accordingly, any review of the Board of Pensions' divestment and equivalency policies would entangle the court in reviewing church doctrine and policy.

In addition, the district court would be required to examine church doctrine and organization to determine whether a breach of contract occurred in this case. The plan document is the primary "contract" between the parties. It provides that the Board of Pensions shall discharge its duties with the care that a prudent person would use in the conduct of an enterprise of like character with like aims. Thus, the district court would be required to examine the ELCA's "aims" before it could determine the breach of contract issue. Such inquiry into church motives is forbidden by the Establishment Clause of the United States Constitution.

The Pastors also contend that this case can be resolved on neutral principles of contract and trust law. We disagree. The flaw in this contention is illustrated by the Pastors' admission that the ELCA could properly prohibit investments by the Board of Pensions in morally obnoxious commercial activity such as

prostitution or pornography. There are no neutral principles of law that would enable a district court to distinguish between investments that Lutheran doctrine should find to be morally acceptable and those that it should find to be morally unacceptable. We conclude that the Establishment Clause of the First Amendment deprives the district court of subject matter jurisdiction in this dispute because review of this issue would require the district court to look beyond neutral principles of contract and trust law and entangle itself in issues of church doctrine.

II.

The ELCA and the Board of Pensions allege that the Freedom of Conscience Clause of the Minnesota Constitution deprives the district court of subject matter jurisdiction. Article I, section 16 of the Minnesota Constitution provides that

> [t]he right of every man to worship God according to the dictates of his own conscience shall never be infringed * * * nor shall any control of or interference with the rights of conscience be permitted, or any preference be given by law to any religious establishment or mode of worship; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace or safety of the state * * *

The Freedom of Conscience Clause affords greater protection for religious liberties against government action than the federal

constitution. State v. Hershberger, 462 N.W.2d 393, 397 (Minn. 1990). In determining whether government action violates the Freedom of Conscience Clause, Minnesota courts consider whether: (1) the objector's belief is sincerely held; (2) the action burdens the exercise of religious beliefs; (3) the state's interest is compelling; and (4) the state action uses the least restrictive means. Hill-Murray Fed'n of Teachers v. Hill-Murray High Sch., 487 N.W.2d 857, 865 (Minn. 1992). Under the Freedom of Conscience Clause, only governmental interests in "peace or safety" and against "acts of licentiousness" will excuse government imposition on religious freedom. Hershberger, 462 N.W.2d at 397.

This court has applied the Freedom of Conscience Clause recently to a discrimination claim brought by a lay church employee against the Eckankar church. Geraci v. Eckankar, 526 N.W.2d 391 (Minn. App. 1995), review denied (Minn. Mar. 14, 1995), cert. denied, 116 S. Ct. 75 (1995). Carol Geraci was a computer programmer for the Eckankar church who claimed that the church discriminated against her on the basis of gender. Id. at 395. The church alleged that Geraci was terminated for failing to work harmoniously with her coworkers in disregard of the sacred teachings of Eckankar. Id. This court concluded that while the state's interest in eradicating discrimination is compelling, it could not question Eckankar's basis for decisions claimed to be doctrinally related because to do so may compel the church to conform its religious beliefs with the government's or with the majority culture's beliefs. Id. at 399.

An analysis of the four elements of the Freedom of Conscience Clause test leads us to conclude that allowing the district court's review of this matter would violate the Freedom

of Conscience Clause. First, there is no question that the ELCA acted pursuant to a sincerely held religious belief by enacting the equivalency policy. The Lutheran World Federation declared that apartheid must be rejected as a matter of the Lutheran faith itself. Similarly, the Constituting Convention of the ELCA passed a resolution stating that divestment was the appropriate response to the "sin of apartheid."

Second, review of this case would burden the exercise of the ELCA's religious beliefs. If the civil courts were allowed to rescind pension plan contracts every time a group of dissenting participants disagreed with the Board of Pensions' social or moral investment strategies, the ELCA's ability to express its faith through social and moral investment would be substantially compromised. Additionally, as in Geraci, to review this case, the district court would be required to question the ELCA's basis for a decision that it contends was founded in Lutheran doctrine. Judicial inquiry into issues of church doctrine is itself a substantial burden. Id. Accordingly, a review of this case would burden the ELCA's exercise of religious beliefs.

Third, the government does not have a compelling interest in reviewing this case. The Pastors argue that there is an important governmental interest in providing a forum for review of this matter. We disagree. The forum best suited to review the Pastors' grievance is the Churchwide Assembly. The delegates to the Churchwide Assembly debated the appropriateness of the equivalency policy at length. As the highest legislative authority in the ELCA, the Churchwide Assembly's determination on this issue is final. The civil courts need not hear this case to ensure public "peace or safety" and the Pastors' breach of contract action does not allege an act of "licentiousness," as required by

the Minnesota Freedom of Conscience Clause.

Because the Pastors have not alleged a compelling governmental interest in hearing this dispute, we need not address the fourth element of the Freedom of Conscience Clause test. We conclude that a review of this case would substantially burden the ELCA's exercise of religion. Therefore, the Freedom of Conscience Clause of the Minnesota Constitution deprives the district court of subject matter jurisdiction in this dispute.

DECISION

The district court erred in denying appellants' motion for summary judgment on the grounds that the court did not have subject matter jurisdiction. The district court's decision is reversed and this matter is dismissed pursuant to the Establishment Clause of the First Amendment and the Freedom of Conscience Clause of the Minnesota Constitution.

Reversed.

s/Thomas Kalitowski
11-17-95

APARTHEID

Statements and actions of The American Lutheran Church dealing with the apartheid system and justice for all peoples in South Africa and Namibia: 1980-1985

- "Goals for Combating Apartheid" (1985)
- "Goals for Combating Apartheid" (1981)
- "Apartheid in South Africa — Is It Any of Our Business?" (1981)
- "Human Rights of the People of Namibia" (1980)
- "Opposition to Apartheid" (1980)

[ALC Logo]

- "South Africa — Divestment" (1981)

I. Goals for Combating Apartheid (1985)

* * *

2. "STATUS CONFESSIONIS"

The American Lutheran Church has declared its opposition to the apartheid system in the strongest of terms. Its 1980 General Convention voted unanimously to "express its unequivocal rejection of apartheid and all other forms of racial discrimination in our own society as well as in other nations, and [to] declare apartheid to be a matter of 'status confessionis.'"

The term means "a state of confession." It was applied to the situation of Lutheran churches in southern Africa, White and Black, by the Sixth Assembly of the Lutheran World Federation, meeting in Tanzania in June 1977. That gathering of the worldwide Lutheran family was determined to say that the apartheid system is so oppressive and so contrary to the Lutheran understanding of the unity of believers in Christ and the equality of the entire human family that it must be rejected as a matter of the faith itself:

> "On the basis of faith and in order to manifest the unity of the church," said the Sixth Assembly, "churches [should] publicly and unequivocally reject the existing apartheid system."

Apartheid is not simply a typical political question, about which Christians may hold differing opinions. It must be viewed from much the same theological perspective that the Confessing Church in Germany adopted in opposing the Hitler

regime 40 some years ago. Apartheid is to be rejected because it violates a central belief of the church as expressed in the Augsburg Confession. The immediate context for the LWF Sixth Assembly action was the separation of Black and White Lutherans in South Africa. As long as that cultural pattern (reinforced by South African law) was followed by the churches, an unbiblical criterion for unity — racial identity — was being used. And since that criterion goes beyond Augsburg's requirement (unity exists when there is agreement on the proclamation of the Word and the administration of the Sacraments), the racial test of unity is not valid and must be rejected.

Apartheid, therefore, presents the church with a "state of confession" because it attacks, in its impact on both church and society, the very heart of the church's confession of faith. By its 1980 convention action, the ALC is affirming the same position. It means that, for the ALC corporately, there can be no argument over whether apartheid is acceptable or reformable. It means that apartheid is viewed by us as simply and starkly in conflict with the biblical faith we hold. It is not a political ideology with which believers may compromise, but must be opposed by whatever means are at hand.

The ALC action of 1980 goes on to say that there are many legitimate strategies for opposing apartheid. One of them, withdrawing the church's investments from business corporations that are active in South Africa, received particular attention prior to and during the 1980 convention. The language adopted by delegates said two things about the strategy of disinvesting:

a. Withdrawing investments is "not a necessary consequence of a declaration of 'status confessionis.'" In other words, people who agree that apartheid is a central matter of the faith and must be opposed may *dis*agree on the strategy of disinvestment (or divestiture).

b. However, the ALC makes the judgment that, "at this moment in history in South Africa, divestiture is the most legitimate strategy in opposing apartheid and the most effective consequence of a declaration of 'status confessionis.'"

The 1980 convention action also supported a "call for withdrawal of investment by United States corporations from South Africa if in the judgment of the Board of Trustees that investment on balance strengthens the apartheid system."

The strategies in "Goals for Combating Apartheid" do not concentrate on corporate investment policy, either ALC withdrawal of holdings in companies or the withdrawal from South Africa of companies which are U.S.-based. Investment policy is, however, a part of the broader concern with economic factors, dealt with in Goal Six, and continues to be a part of the ALC's total strategy for dealing with apartheid.*

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* See "South Africa — Divestment," the May 1981 action by the ALC Board of Trustees in response to the 1980 ALC convention, page 20.

(4)

Supreme Court, U.S.
FILED
JUL 9 1996
CLERK

No. 95-1796

In the

Supreme Court of the United States

October Term, 1995

THE REVEREND THOMAS L. BASICH, et al.,

Petitioners,

v.

BOARD OF PENSIONS, EVANGELICAL LUTHERAN CHURCH IN AMERICA (ELCA), a Minnesota non-profit corporation; EVANGELICAL LUTHERAN CHURCH IN AMERICA (ELCA), a Minnesota non-profit corporation,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE MINNESOTA COURT OF APPEALS

PETITIONERS' REPLY BRIEF

LYNN E. BASICH
Counsel of Record
3000 North Hamline Ave.
Roseville, MN 55113
(612) 633-3232

Robert C. Bell
PETERSON, BELL, CONVERSE
& JENSEN, P.A.
3000 Metropolitan Centre
333 South Seventh Street
Minneapolis, MN 55402
(612) 342-2323

Craig W. Gagnon
Peter R. Bisio
OPPENHEIMER WOLFF & DONNELLY
3400 Plaza VII Building
45 South Seventh Street
Minneapolis, MN 55402
(612) 344-9300
Attorneys for Petitioners

1996 – Bachman Legal Printing ■ (612) 339-9518 ■ FAX (612) 337-8053

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INTRODUCTION

The primary argument in the Briefs in Opposition of Respondents Board of Pensions and Evangelical Lutheran Church in American (collectively "the denomination ELCA") is that the Court of Appeals's decision rests on an independent and adequate state ground -- the Freedom of Conscience Clause of the Minnesota Constitution. While the Minnesota Constitution may provide an independent ground for the Court of Appeals's decision, the central question raised by Petitioners' petition is whether that ground is adequate or whether it violates the United States Constitution. Contrary to the denomination ELCA's suggestion, this question is an appropriate one for this Court. See, e.g., Abie State Bank v. Weaver, 282 U.S. 765, 773 (1931) (stating that it is incumbent upon the Court "to ascertain for itself whether the asserted non-federal ground independently and adequately supports the judgment"); Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673, 681-82 (1930) (holding that there was not an independent and adequate ground of decision because the state supreme court decision violated the due process clause of United States Constitution by depriving plaintiffs of any forum in which to have their case heard). The paucity of authority that the denomination ELCA musters to support the claim that the Court of Appeals's decision does not violate the Constitution merely highlights this as an issue that requires resolution by this Court.[1]

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[1] Although the denomination ELCA also argues that the Court should not grant certiorari because this issue was not raised below, it concedes that this does not preclude this Court from considering this issue. See Brief in Opposition of Board of Pensions at 13-14 (recognizing exceptions to general rule that issue must be raised below); Brief in Opposition of Evangelical Lutheran Church in America at 14-15

The denomination ELCA attempts to obscure this issue by emphasizing a distorted version of the facts in which (1) the money in the pension plan ("Plan") managed by the denomination ELCA belongs to the denomination ELCA; (2) the denomination ELCA owes no direct fiduciary duties to the participants in the Plan including Petitioners; and (3) the Plan did not experience underperformance losses of more than $227 million between 1988 and 1991. None of these "facts" are true. The denomination ELCA also suggests that this lawsuit is about religious doctrine. This, too, is also false.

I. THE FUNDAMENTAL FACT UNDERLYING THIS ENTIRE LITIGATION IS THAT THE PENSION ASSETS BELONG TO THE INDIVIDUAL PARTICIPANTS IN THE PLAN, INCLUDING PETITIONERS, *NOT* TO THE DENOMINATION ELCA.

Each participant has an individual account in the Plan which is immediately 100% vested. Pet. App. P-2. These individual pension accounts are funded by the Petitioners' employer congregations, which contribute a percentage of their employees' income to their employees' individual accounts in the Plan. Id. at O-2 to O-3. Petitioners are *not* employees of the denomination ELCA. They are employees of individual congregations, and each congregation is a separate non-profit corporation. Thus, not one cent of the money in each participant's pension account was contributed to that account by the denomination ELCA. Because the Plan is a

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(same). For the reasons set forth in the Petition for Writ of Certiorari at 9-10, the Court should not find the fact that this issue was not raised below to bar certiorari.

defined contribution plan, it is the participants in the Plan -- and not the denomination ELCA -- who directly bear the risk of investment loss.

II. THE DENOMINATION ELCA OWES DIRECT FIDUCIARY DUTIES TO ALL PARTICIPANTS IN THE PLAN, INCLUDING PETITIONERS.

Under both the common law and the ERISA fiduciary standards the denomination ELCA contracted to follow, the denomination ELCA owes the participants in the Plan duties of undivided loyalty and prudence in the management of the participants' pension accounts. Thus, the applicable fiduciary standards require the denomination ELCA to manage Petitioners' pension accounts *solely* in the interests of Petitioners and for the *exclusive purpose* of providing retirement benefits to Petitioners -- and not for *any* other purpose. Id. at L-4, M-2 to M-3, N-3 to N-4, O-6 to O-7.

III. FOR PURPOSES OF THE COURT OF APPEALS' DECISION AND THIS COURT'S REVIEW, IT *MUST* BE TAKEN AS TRUE THAT THE PLAN SUFFERED $227 MILLION IN LOSSES.

On motions for summary judgment, the court's function is not to decide issues of fact but to determine whether there are issues of fact to be tried. Simonson Cashway Co., Inc. v. Merickel Const. Co., Inc., 391 N.W.2d 903 (Minn. App. 1986). Here, Petitioners submitted an affidavit that shows that the non-social purpose funds of the Plan suffered underperformance losses of more than $227 million between 1988 and 1991. The affidavit was submitted to the trial court in full compliance with Minnesota Rule of Civil Procedure 56.05, and thus the data and the conclusions of the affidavit

had to be taken as true for purposes of the denomination ELCA's summary judgment motion and they must also be taken as true on certiorari. If the denomination ELCA disputes the fact that the Plan suffered underperformance losses of more than $227 million between 1988 and 1991, then, certainly, that is a highly relevant genuine issue of material fact requiring trial, especially since it is the participants, including Petitioners, who directly bear those losses in their personal pension accounts.

IV. THIS LAWSUIT IS NOT ABOUT RELIGIOUS DOCTRINE.

The denomination ELCA suggests that this lawsuit is about religious doctrine. This suggestion is utterly false. There is not one single allegation in Petitioners' Complaint about any religious doctrine, Lutheran or otherwise. All religious doctrine is irrelevant to the management of Petitioners' pension accounts. Pension fund investment practices are governed by common law and ERISA fiduciary standards. In the real world of investment, the general rule is that the fiduciary may not set aside the prudential standard of profit maximization consistent with safety to pursue the fiduciary's religious, political or social goals. Thus, unless the pension account owner gives the fiduciary informed consent to invest or divest the pension account according to nonfinancial goals, then it is not the prerogative of the fiduciary -- in this case the denomination ELCA -- to invest or divest the pension accounts according to the fiduciary's religious, political or social goals.

What the Petitioners object to, and what this lawsuit is really about, is the actual divestment of the Petitioners' pension accounts between 1988 and 1993 of securities of companies doing business in South Africa without

Petititioners' knowledge or informed consent. The denomination ELCA is free to adopt a policy of investment. It is not free, however, to apply that policy to the pension accounts owned by the Petitioners without the Petitioners' permission. Informed consent is a key factor to determining whether a fiduciary has acted properly under the law. In order to determine whether informed consent has been given or not, the civil court would *not* have to inquire into Lutheran doctrine. The only question the trier of fact would have to ask would be: was consent given or not?

Petitioners acknowledge that there may be certain circumstances under which they might not want the denomination ELCA to invest in certain companies. However, any such exceptions are the privilege of the owners of the assets to make. The fiduciary may not act without the express permission of the account owner. The underlying reality in this case is that the denomination ELCA used the Petitioners' property without either the Petitioners' knowledge or consent.[2]

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[2] Respondents also claim that the Minnesota Court of Appeals's decision in this case does not conflict with decisions of other state or federal courts or with relevant decisions of this Court. Petitioners vigorously disagree. The state and federal courts have held repeatedly that when civil, contract, or property rights arise from a church controversy, the civil courts have jurisdiction to apply neutral principles of law. See, e.g., Reardon v. Lemoyne, 454 A.2d 428 (N.H. 1982); Church of God in Christ, Inc. v. Stone, 452 F. Supp. 612 (D. Kan. 1976); Clough v. Wilson, 368 A.2d 231 (Conn. 1976); Atkins v. Walker, 200 S.E.2d 641 (N.C. 1973); Welter v. Seton Hall University, 608 A.2d 206 (N.J. 1992); and Fellowship Tabernacle, Inc. v. Baker, 869 P.2d 578 (Idaho App. 1994). The Minnesota Court of Appeals's decision also conflicts with relevant decisions of this Court. See, e.g., General Council on Finance and Administration of the United Methodist Church v. Superior Court of California, 439 U.S. 1355, 1372-73 (1978) (applicants

If the decision of the Minnesota Court of Appeals is allowed to stand it will mean that under Minnesota law a party to a contract can impose his/her religious beliefs on other parties to the contract. Thus, this Court should grant certiorari in this matter to clarify an area of law that affects every person who enters into a contract with a religious organization, to ensure uniformity of civil court jurisdiction throughout the country when a party to a contract with a religious organization is aggrieved by the organization's conduct, and to protect the fundamental civil rights guaranteed under the United States Constitution to all those whose enter into contractual agreements with religious organizations.[3]

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were "plainly wrong" in asserting that the First and Fourteenth Amendments prevent civil courts from deciding disputes in which breach of contract is alleged); Synanon Foundation, Inc. v. California, 444 U.S. 1307-1308 (1979) (religious foundation not entitled to different treatment under the First and Fourteenth Amendments than that accorded to other charitable trusts; neutral principles of state law should be used to resolve the dispute).

[3] Respondents suggest that the issues raised here are not likely to recur, but this Court is already considering another Petition For Writ of Certiorari to the Minnesota Court of Appeals raising issues similar to those raised here. See Singleton v. Christ the Servant Evangelical Lutheran Church, 541 N.W.2d 606 (Minn. App. 1996), review denied, March 19, 1996 and Olson v. Luther Memorial Church, 1996 WL 70102 (Minn. App. February 13, 1996), review denied, March 19, 1996, petition for cert. filed, (June 17, 1996) (No. 95-___).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: July 9, 1996

Respectfully submitted,

LYNN E. BASICH
Counsel of Record
3000 North Hamline Avenue
Roseville, MN 55113
(612) 633-3232

Robert C. Bell
PETERSON, BELL, CONVERSE, & JENSEN P.A
3000 Metropolitan Centre
333 South Seventh Street
Minneapolis, MN 55402
(612) 342-2323

Craig W. Gagnon
Peter R Bisio
OPPENHEIMER WOLFF & DONNELLY
3400 Plaza VII Building
45 South Seventh Street
Minneapolis, MN 55402
(612) 344-9300